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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 579

CHARLES ILFELD COMPANY, PETITIONER,

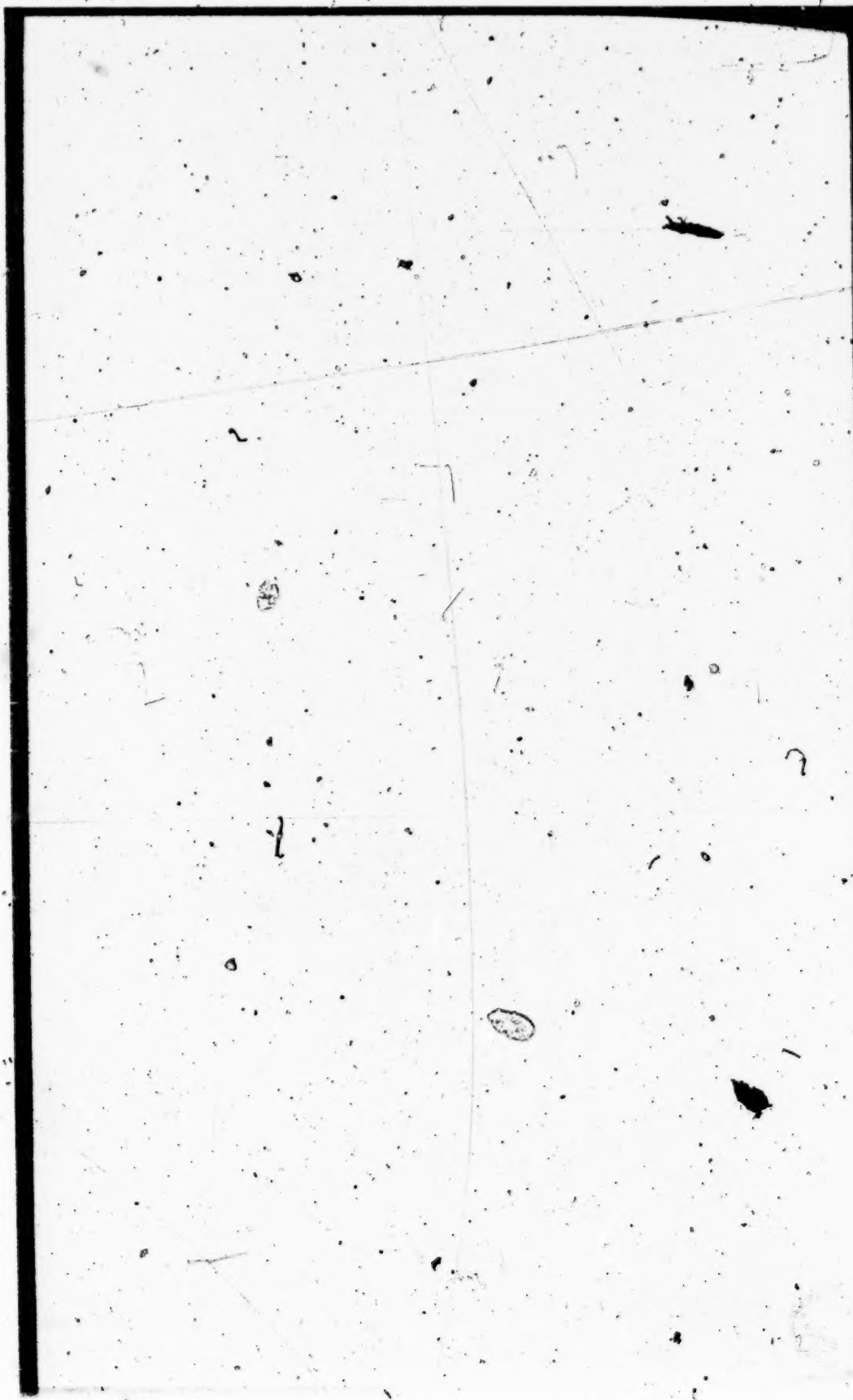
vs.

B. C. HERNANDEZ, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF NEW MEXICO

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 10, 1933

CERTIORARI GRANTED DECEMBER 18, 1933



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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

Law. No. 2462

CHARLES ILFELD COMPANY, a Corporation, Plaintiff,

vs.

B. C. HERNANDEZ, Collector of Internal Revenue, Defendant

COMPLAINT—Filed March 1, 1932

The plaintiff complains of the defendant and alleges:

I

That the plaintiff is a corporation organized and existing under the laws of the State of New Mexico and is engaged in the business of wholesale merchandizing in the State of New Mexico and has been so engaged during all the times hereinafter mentioned; and that the defendant B. C. Hernandez is the duly appointed, qualified and acting Collector of Internal Revenue for the District of New Mexico, with his office at Albuquerque, New Mexico.

II

The plaintiff further alleges that in the year 1917 the plaintiff purchased all of the capital stock of the Springer [fol. 2] Trading Company, a New Mexico corporation, and operated said Springer Trading Company as an affiliated or subsidiary corporation from the year 1917 up to and until the year 1929; and that in the year 1920 the plaintiff purchased all of the capital stock of the Roy Trading Company, a New Mexico corporation, and operated the Roy Trading Company as an affiliated or subsidiary corporation from the year 1920 up to and until the year 1929; and that during the years that said Springer Trading Company and Roy Trading Company were operated as affiliated or subsidiary companies of the plaintiff, the plaintiff filed affiliated returns

as required by the laws of the United States of America and the regulations of the Treasury Department and paid its income tax based on such returns.

III

That the purchase price paid by the plaintiff for all of the stock of the Springer Trading Company in the year of 1917 was the sum of forty thousand ($40,000.00) dollars and that in the year of 1929, the plaintiff sold and disposed of all of the assets of the Springer Trading Company to outside interests and liquidated said corporation as a going concern cancelling its certificates of stock and surrendering its charter; and that the plaintiff derived from the liquidation of said corporation's assets the sum of twenty-two thousand nine hundred fourteen dollars and twenty-two cents ($22,914.22), sustaining a loss on said sale of seventeen thousand eighty-five dollars and seventy-eight cents ($17,085.78); and during the period extending from 1917 to 1929, the plaintiff advanced and loaned to the Springer Trading Company, the sum of sixty-nine thousand thirty dollars and twenty-seven cents ($69,030.27), thereby sustaining a total loss of eighty-six thousand one hundred sixteen dollars and five cents ($86,116.05), all of which was charged off the plaintiff's books at a loss at the close of the year of 1929.

IV

That the purchase price paid by the plaintiff for all of the stock of the Roy Trading Company in the year 1920 was the sum of fifty thousand ($50,000.00) dollars and that in the year of 1929, the plaintiff sold and disposed of all of the assets of the Roy Trading Company to outside interests and liquidated said corporation as a going concern, can-
[fol. 3] celling its certificates of stock and surrendering its charter; and that the plaintiff derived from the liquidation of said corporation's assets the sum of fifteen thousand one hundred six dollars and sixteen cents ($15,106.16), thereby sustaining a loss on said sale of thirty-four thousand eight hundred ninety-three dollars and eighty-four cents ($34,893.84); and during the period extending from 1920 to 1929, the plaintiff advanced and loaned to the Roy Trading Company the sum of nine thousand seven hundred eighty-two dollars and twenty-two cents ($9,782.22) thereby

sustaining a total loss of forty-four thousand six hundred seventy-six dollars and six cents ($44,676.06), all of which was charged off the plaintiff's books as a loss at the close of the year 1929.

V

That this plaintiff in the year 1930, filed with the defendant Collector of Internal Revenue its consolidated return for the year 1929, without deducting the losses sustained by it on the sales of and loans to the two said subsidiary or affiliated companies, as aforesaid, and paid to the defendant Collector of Internal Revenue the sum of twenty thousand eight hundred thirty-six dollars and twenty cents ($20,836.20) in equal quarterly installments of five thousand two hundred nine dollars and five cents ($5,209.05) each, as follows to-wit:

March 15, 1930, the sum of	$5,209.05
June 15th, 1930, the sum of	5,209.05
Sept. 15th, 1930, the sum of	5,209.05
Dec. 15th, 1930, the sum of	5,209.05
Total	$20,836.20

as its tax for said year and thereafter, to-wit, on the 21st day of August, 1931, this plaintiff filed an amended return and claim for refund for the year 1929 with the Commissioner of Internal Revenue at Washington, D. C., setting up said losses sustained as aforesaid, which said claim for refund in the sum of fourteen thousand four hundred sixty dollars and forty-three cents ($14,460.43) was, by the Commissioner of Internal Revenue of the United States, on the 28th day of January, 1932, wrongfully disallowed.

[fol. 4] VI

That by reason of the losses sustained by this plaintiff on the monies loaned and advanced said subsidiary corporations as aforesaid and by reason of the losses sustained by this plaintiff on the liquidation of said corporations, as aforesaid, this plaintiff overpaid the defendant, Collector of Internal Revenue, the sum of fourteen thousand four hundred sixty dollars and forty-three cents ($14,460.43), as aforesaid, and there is now due and owing the plaintiff

from the defendant the sum of fourteen thousand four hundred sixty dollars and forty-three cents ($14,460.43), no part of which has been paid; and although demand has been made for the payment thereof, the defendant has refused to pay the same.

Wherefore, the plaintiff prays judgment against the defendant in the sum of fourteen thousand four hundred sixty dollars and forty-three cents ($14,460.43), together with interest as follows, to-wit:

6% interest on $3,615.10 from March 15, 1930;
6% interest on $3,615.11 from June 15, 1930;
6% interest on $3,615.11 from Dec. 15, 1930; and
6% interest on $3,615.11 from Dec. 15, 1930, until collected; and its costs in this behalf expended.

A. T. Hannett, 509-11 Sunshine Bldg., Albuquerque, New Mex.

Duly sworn to by Rodney E. Horton. Jurat omitted in printing.

[fol. 5] In United States District Court

Answer—Filed April 7, 1932

Comes now the defendant by Hugh B. Woodward, United States Attorney, and Dudley Carroll, Assistant United States Attorney, and answering the complaint herein alleges:

I

Defendant admits the allegations of paragraph numbered one of the complaint.

II

Defendant admits the allegations of paragraph numbered two of the complaint.

III

Defendant admits the purchase price paid by the plaintiff for the stock of the Springer Trading Company in the year 1917 was the sum of $40,000.00, but denies that plaintiff sold and disposed of all the assets of the Springer

Trading Company to outside interests in the year 1929, but alleges the fact to be that from the year 1921 to and including the year 1929, the Springer Trading Company was continuously engaged in selling its assets, and in the year 1929 the last and remaining assets of the said Springer Trading Company were sold to outside interests as alleged in the complaint; defendant admits that in the year 1929 the plaintiff liquidated the said corporation as a going concern and cancelled its certificates of stock and surrendered its charter; defendant admits that plaintiff derived from the said liquidation of the said corporation's assets the sum of $22,914.22, but denies that the said sum was realized in the year 1929, and alleges the fact to be that it was an accumulation from the sale of the assets of the Springer Trading Company from the year 1921 to the year 1929, as alleged above; defendant denies that thereby the plaintiff [fol. 6] sustained a deductible loss of $17,685.78; defendant admits that during the period from 1921 to 1929 plaintiff advanced and loaned to the Springer Trading Company the sum of $69,030.27, but denies that plaintiff sustained a total deductible loss of $86,716.05, and denies that all of said alleged loss was charged off in plaintiff's books at the end of the year 1929, but alleges the fact to be that from the year 1922 to 1929, inclusive, plaintiff filed consolidated income tax returns wherein the plaintiff availed itself of the deductible operating losses of the subsidiary corporation, the said Springer Trading Company, a total amount in excess of the stock investment and amounts loaned and advanced to the said subsidiary corporation during the period as aforesaid.

IV

Defendant admits that the purchase price paid by the plaintiff for the Roy Trading Company in the year 1920 was the sum of $50,000.00; defendant denies that the plaintiff sold and disposed of all the assets of the Roy Trading Company to outside interests in the year 1929, but alleges the fact to be that from the year 1920 to 1929, inclusive, the Roy Trading Company was continuously engaged in selling its assets to outside interests and that only the remaining and unsold assets were disposed of in the year 1929; defendant admits that in the year 1929 the Roy Trading Company was liquidated as a going concern and its cer-

tificate and stock cancelled and its charter surrendered; defendant admits that plaintiff received from the liquidation of said corporation the sum of $15,106.16, but denies that plaintiff thereby sustained a deductible loss of $34,893.84; defendant admits that during the period from 1920 to 1929 plaintiff advanced and loaned to the Roy Trading Company the sum of $9,782.22 but denies that plaintiff thereby sustained a total deductible loss of $44,676.06 and denies that the same was charged off the plaintiff's books as a loss at the close of the year 1929, but alleges the fact to be that from the year 1920 to 1929, inclusive, the plaintiff filed its consolidated income tax return wherein the plaintiff availed itself of the deductible operating losses of the subsidiary corporation, the said Roy Trading Company, a total amount in excess of the stock investment and amounts [fol. 7] loaned and advanced to the said subsidiary corporation during the period as aforesaid.

V

Defendant admits the allegations of paragraph numbered five of the complaint, except that the claim for refund was properly disallowed by the Commissioner of Internal Revenue on the 30th day of January, 1932, and alleges in fact to be that the said claim for refund was without merit and was disallowed by the said Commissioner of Internal Revenue under and by virtue of the provisions of the Revenue Act of 1928, and Regulations 74 promulgated by the Commissioner of Internal Revenue as authorized by Section 141-b of the Revenue Act of 1928.

VI

Defendant denies the allegations of paragraph numbered six of the complaint except that the defendant has refused to pay the claim of the plaintiff as alleged.

For further and separate defense to the plaintiff's complaint, defendant alleges:

1.

That paragraph 141-b of the Revenue Act of 1928 authorizes the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to prescribe such regulations as he may deem necessary in order that the tax

liability of an affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be determined, computed, assessed, collected and adjusted in such manner as clearly to reflect the income and to prevent avoidance of tax liability.

2

That pursuant to such authority the Commissioner of Internal Revenue has prescribed and promulgated its Regulations 75, and Article 37 of said Regulations reads as follows:

"Art. 37.—Dissolutions—Recognition of Gain or Loss

(a) During Consolidated Return Period:

Gain or loss shall not be recognized upon a distribution during a consolidated return period, by a member of an affiliated group to another member of such group, in cancellation or redemption of all or any portion of its stock, and any such distribution shall be considered an intercompany transaction.

(b) After Consolidated Return Period:

Any such distribution after a consolidated return period, whether in complete or partial liquidation, shall be treated as a sale of the stock, and the adjustments specified in articles 33 and 35 will be made, and article 36 will be applicable."

3

That Article 40 of said Regulations 75 contains the following:

"Art. 40.—Bad Debts

(a) Resulting from Transactions During Consolidated Return Period:

Intercompany accounts receivable or other obligations which are the result of inter-company transactions during a consolidated return period shall not be deducted as bad debts during a consolidated return period.

(b) Resulting from Transactions Prior to Consolidated Return Period:

No deduction shall be allowed during a consolidated return period for intercompany accounts receivable or other obligations resulting from intercompany transactions during the period of filing separate returns.

(c) Limitation on Allowance After Consolidated Return Period:

The rules applicable to the allowance of losses upon the sale of bonds shall be applicable to the allowance after the consolidated return period as a bad debt of an intercompany account receivable or other obligation resulting from an intercompany transaction during the consolidated return period."

4

That the liquidation of the said Springer Trading Company and the said Roy Trading Company as alleged in the [fol. 9] plaintiff's complaint constituted distribution during a consolidated return period within the meaning of the provisions of Section 37, Article A of Regulations 75 quoted above; and that the same constituted an intercompany transaction for which no account or loss can be recognized.

Wherefore, defendant prays that the complaint of the plaintiff be dismissed and that the defendant recover its costs herein.

Hugh B. Woodward, United States Attorney, by Dudley Cornell, Assistant U. S. Attorney.

Duly sworn to by Dudley Cornell. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

REPLY—Filed May 11, 1932

Now comes the plaintiff and replying to the Answer heretofore filed herein, admits, alleges, and denies as follows:

I

Denies each and every allegation of new matter in Paragraph III of the defendant's Answer as specifically as if the same were denied at length.

II

Denies each and every allegation of new matter in Paragraph IV of the defendant's Answer as specifically as if the same were denied at length.

III

Denies each and every allegation of new matter in Paragraph V of the defendant's Answer as specifically as if the same were denied at length.

[fol. 10]

IV

In replying to Paragraph I of the defendant's further and separate defense to the plaintiff's complaint, the plaintiff says:

That it admits that Paragraph 141-B of the Revenue Act of 1928 authorizes the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to prescribe such regulations as he may deem necessary as alleged in Paragraph I of said further and separate defense.

V

Replying to Paragraph II of the defendant's further and separate defense, the plaintiff admits that pursuant to such authority, the Commissioner of Internal Revenue, has prescribed and promulgated its Regulations 75 and Article 37, but denies that Article 37 applies to the instant case for the reason that the plaintiff never claimed any gain or loss, nor was any gain or loss determined during the period that the plaintiff filed consolidated returns as alleged in his complaint; and further, plaintiff admits that Article 37-B of Regulations 75 applies in the instant case and alleges and says that it refers to Articles 34 and 35 which are applicable to the instant case and set out the basis for determining deductible losses on investments in stock of subsidiary corporations; and the plaintiff further alleges that the rules promulgated by the Commissioner of Internal Revenue, as aforesaid, further provide: "That if the sale is made during a period during which the selling corporation is a member of the affiliated group (whether or not during a consolidated return period) and if, as a result of such sale, the

issuing corporation ceases to be a member of the affiliated group, such basis shall be determined as follows:

(1) The aggregate basis of all shares of stock of the issuing corporation held by each member of the group (exclusive of the issuing corporation) immediately prior to the sale, shall be determined separately for each member of the group, and adjusted in accordance with the Act (see Sections 111 to 115 inclusive, of the Act and Articles 561 to 629, inclusive, of Regulations 74);

(2) From the sum of the aggregate bases, as determined [fol. 11] in Paragraph (1) above, there shall be deducted the aggregate of the losses of such issuing corporation sustained during each of the consolidated return periods (including only the taxable year 1929 and subsequent taxable years) after such corporation became a member of the group and prior to the sale of the stock, to the extent that such losses could not have been availed of by such corporation as a net loss in computing its tax for such periods if it had made a separate return for each of such periods."

VI

Replying to Paragraph III of the defendant's further and separate defense, the plaintiff says: that it admits that Regulations 75 and Article 40 apply to the instant case but the plaintiff denies that the transactions mentioned and described in the plaintiff's complaint and the defendant's Answer were inter-company transactions, but alleges and says that the loans and advances made to the subsidiary company were first claimed and deducted as of December 31, 1929, after the consolidation period mentioned and described in the plaintiff's complaint was dissolved in November, 1929; and further, that during the period in which the plaintiff filed consolidated returns, the plaintiff never, at any time was allowed the deductible losses claimed in its complaint, by the said commissioner.

VII

Replying to Paragraph IV of the defendant's further and separate defense, the plaintiff denies each and every allegation of new matter therein contained, as specifically as if the same were denied at length.

Wherefore, having fully replied to the allegations of new matter in the defendant's Answer, the plaintiff prays as in its original Complaint.

A. T. Hannett, 509-11 Sunshine Building, Albuquerque, New Mexico, Attorney for the Plaintiff.

Duly sworn to by Rodney B. Horton. Jurat omitted in printing.

[fol. 12] In United States District Court

Waivers of Trial by Jury—Filed May 25, 1932

Now comes the defendant, by his attorneys Hugh B. Woodward, Esquire, and Dudley Cornell, Esquire, and file this, his written waiver of a trial by jury and request the Court to proceed to hear the issues and decide this cause without the intervention of a jury.

Hugh B. Woodward, United States District Attorney, by Dudley Cornell, Assistant U. S. District Attorney.

Now comes the plaintiff by its attorney A. T. Hannett, Esquire, and files this, its written waiver of a trial by jury and requests the Court to proceed to hear the issues and decide this cause without the intervention of a jury.

A. T. Hannett, 509-11 Sunshine Building, Albuquergue, New Mexico, Attorney for the Plaintiff.

In United States District Court

Motion for Judgment—Filed August 5, 1932

Comes now the defendant, B. C. Hernandez, through his attorneys, Hugh B. Woodward, United States Attorney for the District of New Mexico, Dudley Cornell, Assistant United States Attorney for said District, and Eugene Har-
[fol. 13] pole, Special Attorney, Bureau of Internal Revenue, and moves the Court for judgment in behalf of the defendant upon the ground and for the reason that the evi-

dence introduced by the plaintiff is insufficient to support a judgment in his favor.

Dated 5th day of August, 1932.

Hugh B. Woodward, U. S. Attorney, Dudley Cornell, Asst. U. S. Attorney, Eugene Harpole, Special Attorney, Bureau of Internal Revenue, Attorneys for Defendant.

In United States District Court

Request for Special Findings of Fact and Conclusions of Law—Filed August 19, 1932

Comes now the defendant by its attorneys, Hugh B. Woodward, United States Attorney, and Dudley Cornell, Assistant United States Attorney, and Eugene Harpole, Special Attorney of the United States Bureau of Internal Revenue, and requests the Court to make and adopt as its Findings of Fact and Conclusions of Law, in the above entitled case, those Findings of Fact and Conclusions of Law of which a copy is hereto annexed.

Respectfully submitted, Hugh B. Woodward, United States Attorney, by Dudley Cornell, Assistant U. S. Attorney, Eugene Harpole, Special Attorney, U. S. Bureau of Internal Revenue.

Findings of Fact and Conclusions of Law

(Requested)

That above entitled cause came on for trial before the Court, sitting without a jury, at Santa Fe, New Mexico, and the Court having heard and considered all of the evidence introduced at said trial and the admissions contained in the pleadings, makes these, the following its findings of fact on said pleadings and evidence:

[fol. 14] I

That the plaintiff is a New Mexico corporation engaged in the wholesale general merchandise business and was so engaged at all times since the year 1917.

II

That the defendant, B. C. Hernandez, is the duly appointed, qualified and acting United States Collector of Internal Revenue with his office at Albuquerque, New Mexico.

III

That the Springer Trading Company was, at all times, from the year 1917 to the 30th day of December, 1929, a New Mexico corporation.

IV

That the Roy Trading Company was, at all times, from the year 1917 to the 30th day of December, 1929, a New Mexico corporation.

V

That the plaintiff was, at all times, from the year 1917 to and including the 30th day of December, 1929, the owner of more than ninety-five (95) per cent of the capital stock of the Springer Trading Company.

VI

That the plaintiff was, at all times, from the year 1920 to and including the 30th day of December, 1929, the owner of more than ninety-five (95) per cent of the capital stock of the Roy Trading Company.

VII

That on March 15, 1930, the plaintiff, the Charles Ilfeld Company, with the consent of the Springer Trading Company and of the Roy Trading Company, filed a consolidated corporation income tax return, including therein a statement of the income received by itself, the Springer Trading Company and the Roy Trading Company for the calendar year of 1929.

VIII

That the plaintiff purchased all of the capital stock of the [fol. 15] Springer Trading Company in the year 1917 for the sum of $40,000.00.

IX

That the plaintiff purchased all of the capital stock of the Roy Trading Company in the year 1920 for the sum of $50,000.00.

X

That during the period from 1917 to 1929, inclusive, plaintiff advanced and loaned to the Springer Trading Company the sum of $69,030.27, no part of which has ever been repaid.

XI

That during the period from 1920 to 1929, inclusive, plaintiff advanced and loaned to the Roy Trading Company the sum of $9,782.22, no part of which has ever been repaid.

The foregoing request 1 to 11 inclusive refused.

Neblett, Judge.

To the failure of the Court to make the requested findings of fact 1-11 defendant objects and saves an exception.

Dudley Cornell, Assistant U. S. Attorney.

XII

That the plaintiff, Charles Ilfeld Company, for the taxable years 1918 to 1929, inclusive, filed consolidated corporation income tax returns, on which it claimed and received an allowance as deductions from its own net income the following sums as losses sustained by its subsidiaries:

Losses claimed on prior years consolidated returns:

Year	Springer Trading Co.	Roy Trading Co.
1918	2,953.20	
1920	34,979.15	
1921	32,559.68	13,157.09
1922	30,701.29	36,725.55
1923	3,794.38	2,716.22
1924	4,719.71	
1925	11,100.64	5,834.30
1926	3,552.31	
1927	4,491.22	574.09
1928	2,572.83	
1929		2,527.92
Total	131,424.41	61,535.17

[fol. 16] and on which it reported and was taxed upon the following sums as profits reported by its subsidiaries:

Profits reported as a part of the consolidated income were as follows:

Year		
1919	12,077.63	
1920		3,007.34
1924		421.33
1926		965.41
1928		12.84
1929	836.25	
	12,913.88	4,407.32

XIII

That the plaintiff has claimed and been allowed, in the aggregate, as deductions from its own net income, for the taxable years from 1918 to 1928, inclusive, the total sum of $131,434.41 and charged with and taxed upon profits in the total sum of $12,913.88, or allowed aggregate net deductions from its own taxable net income of $118,510.53 on account of operating losses sustained by the Springer Trading Company.

XIV

That the plaintiff has claimed and been allowed, in the aggregate, as deductions from its own net income for the taxable years from 1920 to 1929, inclusive, the total sum of $61,535.17 and charged with and taxed upon profits in the total sum of $4,407.32, or allowed aggregate net deductions from its own taxable income of $58,127.85 on account of operating losses sustained by the Roy Trading Company.

XV

That on the 22nd day of December, 1929, the Springer Trading Company distributed all of its assets, consisting of $22,914.22 in cash, to the plaintiff, which was the only distribution ever received by the plaintiff from the said Springer Trading Company.

XVI

That on the 23rd day of December, 1929, the Roy Trading Company distributed all of its assets, consisting of $15,106.16 in cash, to the plaintiff, from which was the only

distribution ever received by the plaintiff from the said [fol. 17] Roy Trading Company.

XVII

That on the 30th day of December, 1929, the Springer Trading Company, by vote of its stockholders in meeting assembled, suspended corporate activities and thereafter and during the year 1929, cancelled its certificates of stock and surrendered its charter.

XVIII

That on the 30th day of December, 1929, the Roy Trading Company, by vote of its stockholders in meeting assembled, suspended corporate activities and thereafter and during the year 1929, cancelled its certificate of stock and surrendered its charter.

XIX

That plaintiff charged the sum of $86,116.05 off as a loss on its books at the close of the year 1929 as a result of its transactions with the Springer Trading Company during the years 1917 to 1929 inclusive.

XX

That plaintiff charged the sum of $44,676.06 off as a loss on its books at the close of the year 1929 as a result of its transactions with the Roy Trading Company during the years 1920 to 1929, inclusive.

XXI

That the plaintiff paid the defendant as Collector of Internal Revenue, the sum of $20,836.20, in equal quarterly installments, in the year 1930, as its income tax for the calendar year 1929.

XXII

That the plaintiff on May 22, 1931, filed a claim for the refund of $14,460.43 of the taxes paid by it for the year 1929, which claim for refund was disallowed by the Commissioner of Internal Revenue on January 28, 1932.

The foregoing requested findings 15 to 22 inclusive are refused.

Neblett, Judge.

To the refusal of the Court to make the requested find-
[fol. 18] ings of fact 15 to 22 defendant objects and saves an exception.

Dudley Cornell, Asst. U. S. Atty.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

I

That the calendar year 1929 was and constituted a "consolidated return period" for the plaintiff, the Springer Trading Company and the Roy Trading Company.

II

That the plaintiff and the Springer Trading Company were members of the same affiliated group of which the plaintiff was the parent, from the year 1917 to and including the 30th day of December, 1929, within the meaning of Section 141 (d) of the Revenue Act of 1928 (26 U. S. C. A. 2141.)

III

That the plaintiff, the Springer Trading Company and the Roy Trading Company were members of the same affiliated group of corporations, of which the plaintiff was the parent, from the year 1920 to and including December 30, 1929, within the meaning of Section 141 (d) of the Revenue Act of 1928 (26 U. S. C. A. 2141).

IV.

That the distribution by the Springer Trading Company and the Roy Trading Company of all their assets to the plaintiff on December 23, 1929, was a distribution during a "consolidated return period", by a member of an affiliated group of corporations to another member of such group, in cancellation or redemption of all or a portion of its stock and an intercompany transaction upon which Gain or Loss shall not be recognized within the meaning and intent of Article 37 (a) of Treasury Regulations 75, promulgated under the authority of Section 141 (b) of the Revenue Act of 1928 (26 U. S. C. A. 2141).

V

That the pleadings filed and the evidence introduced in this case are not sufficient to enable the Court to determine what portion of the sum of $69,030.27 advanced and loaned to the Springer Trading Company by the plaintiff during the period from 1917 to 1929, inclusive, was advanced and loaned during the "consolidated return period" of 1929 and what portion, if any, was advanced and loaned prior thereto.

VI

That the pleadings filed and the evidence introduced in this case are not sufficient to enable the Court to determine what portion of the sum of $9,782.22 advanced and loaned to the Roy Trading Company by the plaintiff during the period from 1920 to 1929, inclusive, was advanced and loaned during the "consolidated return period" of 1929 and what portion, if any, was advanced and loaned prior thereto.

VII

That in the absence of proof to the contrary, it is to be presumed that all of the sums advanced and loaned by the plaintiff to the Springer Trading Company and the Roy Trading Company were advanced and loaned during a "consolidated return period" constituted intercompany transactions and shall not be deducted as bad debts by the plaintiff during the taxable year 1929 by reason of Article 40 (a) of Treasury Regulations 75 promulgated under the authority of Section 141 (b) of the Revenue Act of 1928 (26 U. S. C. A. 2141).

VIII

That the plaintiff and the Springer Trading Company and the Roy Trading Company, by the filing of a consolidated return for the year 1929, consented to and are bound by all of the provisions of Treasury Regulations 75 promulgated under Sub-section (b) of Section 141 of the Revenue Act of 1928 (26 U. S. C. A. 2141).

IX

That the plaintiff sustained no deductible loss by reason of the cancellation of the certificates of stock and the sur-

rendering of the charter and the liquidation of its subsidiaries, the Springer Trading Company and the Roy Trading Company.

X

That the evidence introduced at the trial and the admis- [fol. 20] sions contained in the pleadings filed are insufficient to support a judgment in favor of the plaintiff.

XI

That the plaintiff is not entitled to recover judgment against the defendant in this action.

XII

That the defendant in this action is entitled to recover judgment against the plaintiff for his costs.

All the foregoing requested conclusions of law are refused.

Neblett, Judge.

To the refusal of the Court to make the above requested conclusions of law I to XII defendant objects and saves an exception.

Dudley Cornell, Asst. U. S. Atty.

In United States District Court

Findings of Fact and Conclusions of Law—Filed August 19, 1932

The Court having read and considered the Requested Findings of Fact and Conclusions of Law submitted by the plaintiff and the defendant and being fully advised in the premises, doth make the following Findings of Fact and Conclusions of Law:

Finding of Fact No. 1

That the plaintiff Charles Ilfeld Company, a corporation, in the year 1917 purchased all of the capital stock of the Springer Trading Company, a corporation, and operated said Springer Trading Company, as an affiliated or sub-

sidiary corporation from the year 1917 up to and including the month of November, 1929, as a going concern; and further, that in the year of 1920, the plaintiff purchased all of the capital stock of the Roy Trading Company, a New Mexico corporation, and operated the Roy Trading Company as an affiliated or subsidiary corporation from the year 1920 up to and including the month of November, 1929, as a going concern, and that during the years that said Springer Trading Company and Roy Trading Company were operated as affiliated or subsidiary corporations, [fol. 21] of the plaintiff as aforesaid, the plaintiff Charles Ilfeld Company filed affiliated returns as required by the laws of the United States and the Treasury Department and paid its income tax based on such returns, and availed itself of the annual operating losses of said subsidiaries during the said period of affiliation.

Finding of Fact No. 2

That the purchase price paid by the plaintiff for all of the stock of the Springer Trading Company in the year 1917 was the sum of forty thousand ($40,000.00) dollars; and that during the period extending from 1917 to 1929, the plaintiff advanced and loaned to the Springer Trading Company the sum of sixty-nine thousand thirty dollars and twenty-seven cents ($69,030.27); and that during the year 1929, up to and including the month of November, 1929, the Springer Trading Company liquidated and sold all of its assets to outside interests and paid all of its obligations; and that the affiliation between the plaintiff corporation and the said Springer Trading Company terminated in the month of November, 1929, at which time, said corporation suspended its business and ceased to function; and in the month of December, 1929, said Springer Trading Company turned over to the parent company the cash proceeds derived from liquidation, the said plaintiff realizing therefrom the sum of twenty-two thousand nine hundred fourteen dollars and twenty-two cents ($22,914.22), the sum being the only monies or thing of value ever paid over to the plaintiff parent corporation by said Springer Trading Company, at any time since the purchase by the plaintiff of all the stock of said Springer Trading Company, and further, that the plaintiff Charles Ilfeld Com-

pany sustained a loss on its capital investment in said Springer Trading Company during the period of affiliation, of the sum of eighty-six thousand one hundred sixteen dollars and five cents ($86,116.05) and that all of said loss was charged off the books of the plaintiff corporation as a loss at the close of the year 1929.

Finding of Fact No. 3

That the purchase price paid by the plaintiff for all of the stock of the Roy Trading Company in the year 1920 was the sum of fifty thousand ($50,000.00) dollars; and that during the period extending from 1920 to 1929, the [fol. 22] plaintiff advanced and loaned to the Roy Trading Company the sum of nine thousand seven hundred eighty-two dollars and twenty-two cents ($9,782.22); and that during the year 1929 and up to and including the month of November, 1929, the Roy Trading Company liquidated and sold all of its assets to outside interests and paid all of its obligations; and that the affiliation between the plaintiff parent corporation and said Roy Trading Company terminated in the month of November, 1929, at which time said corporation suspended its business and ceased to function; and in the month of December, 1929, said Roy Trading Company turned over to the parent company the cash proceeds derived from liquidation realizing therefrom the sum of fifteen thousand one hundred six dollars ($15,106.16), said sum being the only monies or thing of value ever paid over to the plaintiff parent corporation by said Roy Trading Company, at any time since the purchase by the plaintiff of all of the stock of said Roy Trading Company; and further, that the plaintiff Charles Ilfeld Company sustained a loss in the operation of said Roy Trading Company during the period of affiliation of the sum of forty-four thousand six hundred seventy-six dollars and six cents ($44,676.06), and that all of said loss was charged off the books of the plaintiff corporation as a loss at the close of the year 1929.

Finding of Fact No. 4

That both the Springer Trading Company and the Roy Trading Company were liquidated and dissolved in the month of November, 1929, and that thereafter, in the month

of December, 1929, the cash realized from said liquidation and dissolution was paid over by said subsidiary corporations to the parent corporation.

Finding of Fact No. 5

That in the year of 1930 the plaintiff filed with the Collector of Internal Revenue its consolidated return, covering the plaintiff corporation's operations and the operations of the said subsidiary corporation, the Roy Trading Company and the Springer Trading Company without deducting the said losses sustained by it, the plaintiff, on the liquidation and dissolution of the said two subsidiary or affiliated companies, and paid to the defendant Collector of Internal Revenue the sum of twenty thousand eight hun- [fol. 23] dred thirty-six dollars and twenty cents ($20,836.20) in equal quarterly installments of five thousand two hundred nine dollars and five cents ($5,209.05) each, as follows:

March 15, 1930, the sum of	$5,209.05
June 15, 1930, the sum of	$5,209.05
Sept. 15, 1930, the sum of	$5,209.05
Dec. 15, 1930, the sum of	$5,209.05
Total	$20,836.20

as its tax for the said year; and thereafter, in the month of May, 1931, the plaintiff filed an amended return and claim for refund for the year 1929, with the Commissioner of Internal Revenue at Washington, D. C., setting up said losses sustained as aforesaid as deductible losses, which said claim for refund in the sum of fourteen thousand four hundred sixty dollars and forty-three cents ($14,460.43) was by the Commissioner of Internal Revenue of the United States, on the 28th day of January, 1932, disallowed.

Finding of Fact No. 6

That the plaintiff the Charles Ilfeld Company, for the taxable years 1918 to 1929 inclusive, filed consolidated corporation income tax returns, on which it claimed and received an allowance as deductions from its own net income the following sums as losses sustained by its subsidiaries: Losses claimed on prior years consolidated returns:

Year	Springer Trading Company	Roy Trading Company
1918	$2,953.20	$
1920	34,979.15	
1921	32,559.68	13,157.09
1922	30,701.29	36,725.55
1923	3,794.38	2,716.22
1924	4,719.71	
1925	11,100.64	5,834.30
1926	3,552.31	
1927	4,491.22	574.09
1928	2,572.83	
1929		2,527.92
Total	$131,424.41	$61,535.17

[fol. 24] and on which it reported and was taxed upon the following sums as profits realized by its subsidiaries:

Profits reported as a part of the consolidated income were as follows:

Year		
1919	$12,077.63	$
1920		3,007.74
1924		421.33
1926		965.41
1928		12.84
1929	836.25	
Total	$12,913.88	$4,407.32

Finding of Fact No. 7

That the plaintiff has claimed and been allowed, in the aggregate, as deductions from its own net income for the taxable years from 1918 to 1928, inclusive, the total sum of $131,424.41, and charged with and taxed upon profits in the total sum of $12,913.88, or allowed aggregate net deductions from its own taxable net income of $118,510.53 on account of operating losses sustained by the Springer Trading Company.

Finding of Fact No. 8

That the plaintiff has claimed and been allowed, in the aggregate, as deductions from its own net income for the tax-

able years from 1920 to 1929, inclusive, the total sum of $61,535.17, and charged with and taxed upon the profits in the total sum of $4,407.32, or allowed aggregate net deductions from its own taxable net income of $58,127.85 on account of operating losses sustained by the Roy Trading Company.

Finding of Fact No. 9

The Court finds the allegations of the plaintiff's complaint to be true and finds the issues generally in favor of the plaintiff; and further finds that the plaintiff is entitled to judgment against the defendant in the sum of fourteen thousand four hundred sixty dollars and forty-three cents ($14,460.43), together with interest as follows, to-wit:

6% interest on $3,615.10 from March 15, 1930;

6% interest on $3,615.11 from June 15, 1930;

[fol. 25] 6% interest on $3,615.11 from Sept. 15, 1930; and

6% interest on $3,615.11 from Dec. 15, 1930, until collected; and its costs in this behalf expended.

Conclusion of Law

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

Conclusion of Law No. 1

That the liquidating dividends paid over by the subsidiary corporations the Springer Trading Company and the Roy Trading Company to the plaintiff in the month of December, were not paid over in cancellation or redemption of any part or portion of the stock of said corporations, nor was such payment in either instance an inter-company transaction.

Conclusion of Law No. 2

That the period of time from January first, 1929, up to and including the month of November, 1929, when the affiliations between the two subsidiary companies and the plaintiff parent corporation were broken by liquidation, constituted a consolidated return period; and the payment over of the liquidating dividends by said subsidiary companies in December, 1929, was not made during a consolidated return period.

Colin Neblett, Judge.

IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed August 19, 1932

This cause came on regularly to be heard before the Court on the 5th day of August, 1932, each of the parties hereto having filed a formal written waiver of jury trial, and the Court having heard all of the evidence and the arguments of counsel and the Court having considered the requested Findings of Fact made by both the plaintiff and defendant and being fully advised in the premises

It is ordered, adjudged and decreed that the plaintiff do have and recover of the defendant the sum of fourteen thousand four hundred sixty dollars and forty-three cents ($14,460.43), together with interest as follows, to-wit:

6% interest on $3,615.11 from March 15, 1930;

6% interest on $3,615.11 from June 15, 1930;

[fol. 26] 6% interest on $3,615.11 from Sept. 15, 1930; and

6% interest on $3,615.11 from Dec. 15, 1930, until collected; and its costs in this behalf expended, to be taxed by the Clerk.

Colin Neblett, Judge.

IN UNITED STATES DISTRICT COURT

RULE OF COURT EXTENDING TIME WITHIN WHICH TO SETTLE BILL OF EXCEPTIONS

In the Matter of Rules of Court. No. 1426 Miscellaneous

It is ordered by the Court that the following rule be and it is hereby promulgated as an addition to Rule XXI entitled: "Appeal and Error".

"In appealed Law or Criminal cases, the Bill of Exceptions or Summary of the Evidence may be settled by the Court at any time prior to the date the transcript of the record on appeal must be filed and docketed with the Circuit Court of Appeals. Should the term of court at which the judgment was entered expire prior to said date, the term is hereby extended accordingly for said purposes without further order of court."

Santa Fe, New Mexico, this 1st day of October, 1930.

Colin Neblett, United States District Judge.

IN UNITED STATES DISTRICT COURT

BILL OF EXCEPTIONS—Filed Dec. 21, 1932

Be it remembered that heretofore, to-wit: on the 5th day of August, 1932, the above entitled cause came on regularly for trial at Santa Fé, New Mexico, upon the issues joined herein, before the Honorable Colin Neblett, sitting as Judge of the above entitled court, without a jury, a jury having been duly waived by the parties by written stipulation, as follows, to-wit:

WAIVER OF JURY TRIAL

Now comes the plaintiff by its attorney, A. T. Hannett, Esquire, and files this, its written waiver of a trial by jury [fol. 27] and requests the Court to proceed to hear the issues and decide this cause without the intervention of a jury.

(Signed) A. T. Hannett, 509-11 Sunshine Bldg., Albuquerque, N. Mex., Attorney for the Plaintiff.

WAIVER OF TRIAL BY JURY

Now comes the defendant by his attorneys Hugh B. Woodward, Esquire, and Dudley Cornell, Esquire, and file this, his written Waiver of a Trial by Jury and request the Court to proceed to hear the issues and decide this cause without the intervention of a jury.

(Signed) Hugh B. Woodward, United States District Attorney. Dudley Cornell, Assistant U. S. District Attorney.

Thereupon the plaintiff introduced the following evidence:

The following Exhibit A (Internal Revenue Agent's report, dated October 10, 1931) was offered in evidence with the following statement:

Mr. Hannett: We have agreed that the audit of the books made by Mr. Warner Blair, who is auditor for the government, and which audit was the basis on which the government denied our claim, shall be received in evidence as to the facts and figures governing this suit. Is that right?

Mr. Harpole: It is agreed that the figures of the government agent's report are accurate and taken from the record.

Mr. Hannett: However, we do not agree that the final

entry made by the Auditor where he charged this loss which we claim, to surplus. We claim that charge was incorrectly made, but should have been charged to Profit and Loss. Neither do we agree with his Conclusion of Law or citations of law, but as to capital investment, facts and figures, dissolution of the corporation and termination of affiliation that are set forth, are agreed to by all parties. We ask that this audit be marked Plaintiff's Exhibit A and offered in evidence with that statement.

The Court: It will be admitted.

[fol. 28] PLAINTIFF'S EXHIBIT A

Treasury Department, Internal Revenue Service

Office of Internal Revenue Agent in Charge

October 10, 1931.

In re Charles Ilfeld Company, Las Vegas, New Mexico.
Date of report: October 10, 1931. Years covered: 1929

SIRS: There is attached a statement of adjustments which this office proposes to recommend, affecting your income tax liability. If the adjustments suggested are satisfactory, and you do not desire to file a protest, the inclosed agreement form should be signed by you and forwarded to this office. Interest is payable on deficiencies found due as set forth on the attached Form 882.

If you do not agree with the conclusions set forth in the inclosed statement it is desired that every opportunity be afforded you to present to this office any objections or additional information. You are accordingly granted thirty days from date of this letter within which you may, if you so desire, protest the proposed adjustments. The protest and any additional statement of facts must be submitted to this office, executed in triplicate under oath, and should contain the following information:

(a) The name and addddess of the taxpayer (in the case of an individual the residence, and in the case of a corporation the principal office or place of business); (b) in the case of a corporation the name of the State of incorporation;

(c) the designation by date and symbol of the letter advising of the proposed deficiency with respect to which the protest is made; (d) the designation of the year or years involved and a statement of the amount of tax in dispute for each year; (e) an itemized schedule of the findings to which the taxpayer takes exception; (f) a summary statement of the grounds upon which the taxpayer relies in connection with each exception; (g) in case the taxpayer desires a hearing, a statement to that effect; and (h) in case the protest is prepared or filed by an attorney or agent it shall have thereon a statement signed by such attorney or agent showing whether or not he prepared it and whether or not the attorney or agent knows of his own knowledge that the facts therein are true.

[fol. 29] If a protest is filed it will be given careful consideration in this office before the recommendations are forwarded to Washington for action. In the event that you do not protest within the thirty-day period, the case will be forwarded immediately thereafter to the Bureau at Washington for review.

In the event the recommendations are not approved upon review in Washington, you will be notified and given opportunity to discuss the changes with this office, or should you fail to protest to this office, any protest which you may subsequently file with Washington will be referred to this office for consideration.

If a deficiency is indicated no remittance should be made until you receive notice of assessment from the Collector of Internal Revenue for your district.

Please acknowledge receipt by return mail, signing the next attached agreement form.

Respectfully, H. T. McCauley, Internal Revenue Agent in Charge.

Inclosures: Statement of adjustments; Forms 882 and 873.

File No. 5844. In re: Charles Ilfeld Company, Las Vegas, New Mexico. Place: Las Vegas, New Mexico. Date: August 2, 1931.

Examining Officer: Warner Blair. Time spent on examination: 12½ days.

——— ———, Internal Revenue Agent in Charge, Denver, Colorado.

An examination of the books and records of the above-named corporation for the year 1929, disclosed the following in connection with its income tax liability:

Summary

Year	Total tax liability	Deficiency in tax	Over-assessment	Penalties	District filed
1929	20,732.37		103.83		New Mexico

Net result: Overassessment 103.83.

Nature of business: Wholesale General Merchandise.

Authority for examination: Original 1929 return, Form 1120.

Comparison has been made with same.

[fol. 30] Affiliation: Yes. Waivers: None.

Claims: Filed May 22nd, 1931, in amount 14,460.43.

Correspondence from Bureau: None.

Warner Blair, Internal Revenue Agent.

Enclosures: Original 1929 return, Form 1120.

mtm.

Preliminary Statement

In re Charles Ilfeld Company, Las Vegas, New Mexico. Date: August 21, 1931. Examining Officer: Warner Blair

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Exhibit C.—Analysis Surplus—Chas. Ilfeld Co.
Exhibit D.—Reconciliation Consolidated Income.
Exhibit E.—Depreciation Schedules.
Exhibit F.—Balance Sheet—Roy Trading Co.
Exhibit G.—Analysis Surplus—Roy Trading Co.
Exhibit H.—Balance Sheet—Springer Trading Co.
Exhibit J.—Analysis Surplus—Springer Trading Co.

Summary

Year	Total tax liability	Deficiency in tax	Over-assessment	Penalties
1929	20,732.37		103.83	

Net overassessment: 10,283.

Principal causes of overassessment: Adjustment of loss and gain on sale of property by subsidiary companies.

Officers with whom findings were discussed, and conclusions:

Mr. Louis C. Ilfeld, Attorney and Director. Findings are not agreed to and protest will be made on basis of claim for loss on liquidation of subsidiaries.

Financial history of organization: Covered in prior revenue agent's reports. No changes in financial arrangement during current year except liquidation and dissolution of two subsidiaries, comment on which is fully covered hereinafter.

[fol. 31] Affiliation: The following companies have been determined to have been affiliated during 1929, in accordance with Section 141(d), Revenue Act of 1928:

Charles Ilfeld Co.—Las Vegas, N. Mex.—Parent.

Roy Trading Co.—Roy, N. Mex.—Subsidiary.

Springer Trading Co.—Springer, N. Mex.—Subsidiary.

Charles Ilfeld Company owned one hundred per cent of the capital stock of each of the two subsidiaries until they were liquidated and dissolved in November, 1929.

An affiliation return was filed for 1929, and Forms 1122 and 851 were properly filled out and filed with the return.

No basis for affiliation of any other companies was found to exist as the Charles Ilfeld Company did not own or control ninety-five per cent of the stock of any other company.

Claim for refund: Taxpayer has filed a claim for refund of income tax in amount of 14,460.43 for year 1929, claiming a deduction for losses sustained on the liquidation of the two subsidiaries during the year as follows:

Roy Trading Company	44,676.06
Springer Trading Company	86,116.05

The Springer Trading Company became affiliated in the latter part of 1917, and the Roy Trading Company in 1920. Affiliated returns have been filed for all years and the net losses of subsidiaries availed of by the parent company during the years of affiliation as finally corrected and adjusted per revenue agent's reports were as follows:

Year	Springer Trading Co.	Roy Trading Co.
1918	2,933.20	
1920	34,979.13	
1921	32,339.68	13,157.09
1922	30,701.29	36,725.55
1923	3,794.38	2,716.22
1924	4,719.71	
1925	11,100.64	5,834.30
1926	3,552.31	
1927	4,491.22	574.09
1928	2,572.83	
1929		2,527.92
Total	131,424.41	61,535.17

[fol. 32] Profits reported as a part of the consolidated income were as follows:

Year		
1919	12,077.63	
1920		3,007.74
1924		421.33
1926		965.41
1928		12.84
1929	836.25	
Total	12,913.88	4,407.32

The losses claimed were determined as follows:

Springer Trading Company:	
Stock Investment	40,000.00
Accounts Receivable	69,030.27
	109,030.27
Amount realized from liquidation	22,914.22
Loss claimed	86,116.05
Roy Trading Company:	
Stock Investment	50,000.00
Accounts Receivable	9,782.22
	59,782.22
Amount realized from liquidation	15,106.16
Loss claimed	44,676.06

Taxpayer contends that in accordange with Art. 34(c) (2) Reg. 75; U. S. Publishers Corp. v. Anderson, 42 Fed. (2d) 781; and G. C. M. 7765; the basis of the stock in the hands of the parent corporation cannot be adjusted account prior gains or prior losses of the subsidiaries, whether or not such gains or losses were availed of by the parent corporation in the consolidated return.

Reference to citations quoted refer to the sale of a subsidiary corporation's stock to outside interests and in the opinion of the examining officer they do not apply to the instant case.

In both of the instant cases the assets of the subsidiaries were sold to outside interests and the proceeds from the sales together with any remaining assets were taken over [fol. 33] and applied by the parent company against the investment and indebtedness of these subsidiaries and the subsidiaries were dissolved.

Under prior Revenue Acts and in accordance with the decision in the appeal of Riggs National Bank, 17 B. T. A. 615, the basis would have been reduced by the net losses availed of by the parent corporation in its consolidated returns as "it is not lightly to be assumed that congress intended that the same taxpayer should have the same deduction twice". Therefore, even on the old basis, it will be noted that the net losses availed of by the parent corporation are in excess of the basis in each instance and as a result no loss on liquidation would be allowable.

However, this is a 1929 transaction and by no stretch of the imagination can be considered other than a winding up dissolution and as per Article 37 (a), Reg. 75:

"Gain or loss shall not be recognized upon a distribution during a consolidated return period, by a member of an affiliated group to another member of such group, in cancellation or redemption of all or any portion of its stock; and any such distribution shall be considered an intercompany transaction."

The facts established that the distribution and liquidation in question occurred during the consolidated period.

Article 40 (a) Regulations 75, also reads as follows:

"Intercompany accounts receivable or other obligations which are the result of intercompany transactions during a

consolidated return period shall not be deducted as bad debts during a consolidated return period."

Therefore, in the opinion of the examining officer the claim should be denied as to losses on liquidation but allowed as to corrected operating profit and loss of the subsidiaries for current year as reflected in this report.

Schedule 1

Net Income

Net income as disclosed by return	188,753.66
As corrected	190,167.77
Net adjustment	1,414.11

[fol. 34]

Unallowable deductions and additional income:

(a) Excess depreciation	1,352.38	
(b) Adj. profit on sale assets	81.08	
Total		1,433.46

Non-taxable income and additional deductions:

(c) Interest paid	19.35	
Total		19.35
Net adjustment as above		1,414.11

Schedule 1-a

Explanation of Changes

(a) Excess depreciation for year 1929 as per Exhibit E.

(b) Adjustment of profit and loss on sale of various assets as follows:

Auto at Santa Fe—Sale Price		500.00
Cost Price 1928	667.12	
Depreciation allowed 1928	22.26	
		644.86
Loss sustained		144.86

No loss or gain per books account depreciation charged off on books	167.12		
Net decrease in Income			144.86
Furniture and Fixture Raton—Sale Price		125.00	
Cost Price Apl 1927	425.00		
Depreciation allowed	185.94	239.06	
Loss sustained	114.06		
Loss per books		100.00	
Net decrease in Income			14.06
Total decrease in Income			158.92

[fol. 35]

Autos—Raton—Sale Price		200.00	
Cost Price 1925	800.00		
Depreciation allowed	700.00	100.00	
Net gain		100.00	
Loss reported on books		140.00	
Net Increase in Income			240.00
Net adjustment			81.08

(c) Interest paid on a deficiency in income tax is an allowable deduction.

Total amount paid in November, 1929, as deficiency and interest for year 1927	214.88
Amount of deficiency in Tax	195.53
Balance representing interest paid	19.35

Roy Trading Company — Year 1929

Schedule 2

Net Income

Net loss as disclosed by books	2,387.90
As corrected net loss	2,527.92
Net adjustment	140.02

Non-taxable income and additional deductions:

(a) Additional loss on sale assets	140.02	
Net adjustment as above		140.02

[fol. 36] Schedule 2-a

Explanation of Changes

(a) Additional loss on sale of assets as follows:

Sale price		8,170.09
Cost price:		
Land	1,904.40	
Buildings 1919	15,301.24	
	17,205.64	
Depreciation allowed	7,959.13	
		9,246.51
Net loss		1,076.42
Loss reported on books		936.40
Additional loss		140.02

Springer Trading Company Year 1929

Schedule 3

Net Income

Net income as disclosed by books	3,054.23
As corrected	836.25
Net adjustment	2,217.98

Non-taxable income and additional deductions:

(a) Adj. profit on sale assets	2,217.98	
Net adjustment as above		2,217.98

[fol. 37] Schedule 3-a

Explanation of Changes

(a) Reduction in gain on sale of assets as follows:

Sale Price		22,500.00
Cost 1919—Land	600.00	
Buildings	44,659.85	
Imprv.	460.41	
Furn. & Fix	4,109.97	
	49,830.23	
Depreciation allowed	28,261.22	
		21,569.01
Net gain		930.99
Gain as shown on books		3,148.97
Net reduction		2,217.98

Charles Ilfeld Company Year 1929

Schedule 4

Consolidated Net Income 1929

Net income as corrected:	
Chas. Ilfeld Co. Schedule 1	190,167.77
Springer Trading Co. Schedule 3	836.25
	191,004.02
Net loss as corrected:	
Roy Trading Co. Schedule 2	2,527.92
Aggregate Net Income	188,476.10

Schedule 5

Computation of Tax

Income Tax

Net income for taxable year	188,476.10
Balance subject to tax	188,476.10

Income tax at 11%	20,732.37
Total tax assessable	20,732.37
Tax previously assessed	20,836.20
Overassessment	103.83

[fol. 38]

Charles Ilfeld Company, Year 1929

EXHIBIT A

Balance Sheet—December 31, 1928

Assets	Per Books	Debit	Credit	Amended
Cash	321,334.09			321,334.09
Notes Rec.	107,439.05	(a)78,812.49		186,251.54
Accts. Rec.	567,528.83			567,528.83
Inv. Mdse.	900,767.94			900,767.94
Inv. Hides, Wool, Pelts, etc.	17,075.50			17,075.50
Special Funds	2,850.00			2,850.00
Stocks—Other Companies	416,601.13			416,601.13
Stock — Springer Trading Company	1,950.39	(b)39,478.61	(c) 1,429.00	40,000.00
Stock—Roy Trading Co.	41,291.10	(b) 8,708.90		50,000.00
Bonds	1,250.00	(d) 340.00		1,590.00
Accts. Rec. Sub.	614,646.71			614,646.71
Notes Rec.—Stockholders	94,783.74			94,783.74
Land and Real Estate	16,052.68			16,052.68
Improvements	142,176.92		(e) 158.75	142,018.17
Furn. & Fix.	41,297.78		(f) 12,168.61	29,129.17
Autos	13,138.59		(g) 1,138.45	12,000.14
Prepaid Expenses	4,362.31			4,362.31
Total Assets	3,304,546.76			3,416,991.95
Liabilities				
Deposits	52,195.07			52,195.07
Accts. Pay.	92,688.84			92,688.84
Accrued Expense	21,988.72			21,988.72
Due to Subs	232,964.45			232,964.45
Chas. Ilfeld J. P. Acct.	429,400.82			429,400.82
Deferred Profits	792.05			792.05
Res. for Depr.	137,640.83	(b)11,831.90		125,808.93
Capital Stock—Preferred	340,000.00			340,000.00
Capital Stock—Common	1,142,240.00			1,142,240.00
Surplus	854,635.98	(i)14,894.81	(i)139,171.90	978,913.07
Totals	3,304,546.76	154,066.71	154,066.71	3,416,991.95

[fol. 39] EXHIBIT A-1

Explanation of Changes

(a) Notes of subsidiary companies charged off but disallowed as a deduction in prior years:

Springer Trading Co. 1921	50,000.00
Springer Trading Co. 1924	19,030.27
Roy Trading Co. 1924	9,782.22
	78,812.49

(b) Restoration of charge off account shrinkage in value of stock of Springer Trading Company and Roy Trading Company disallowed as a deduction in 1924.

(c) Elimination of appreciation in value of subsidiary stock as per adjustment prior years.

(d) Restoration of War Mother's Memorial bonds disallowed as a loss in 1927.

(e) Elimination of repair expense on Salome Building erroneously capitalized on books.

(f) Adjustment for Exhaustions occurring to 12/31/28 as follows:

Magdelena Furn. & Fix. 1927	1,263.17
Magdelena Furn. & Fix. 1928	137.65
Las Vegas Furn. & Fix. 1927	3,590.47
Las Vegas Furn. & Fix. 1928	7,124.52
	12,116.11
Additional credit for typewriter sold at Las Vegas 1928	57.25
	12,173.36
Less:	
Excess credit for desk returned L. V. 1928	4.75
Net adjustment	12,168.61

(g) Elimination of Magdalena Autos exhausted thru depreciation.

(h) Correcting reserve to amended figure per Exhibit E.

(i) Net adjustment to surplus:	Debit	Credit
Items (e), (e), (f) and (g)	14,894.81	
Items (a), (b), (d) and (b)		139,171.90

[fol. 40]

EXHIBIT B

Balance Sheet—December 31, 1929

Assets	Per Books	Debit	Credit	Amended
Cash	374,783.59			374,783.59
Notes Rec.	95,222.55			95,222.55
Accts. Rec.	541,300.01			541,300.01
Inv. Mdse.	735,069.03			735,069.03
Inv. Wool, Hides, Pelts, etc.	3,306.09			3,306.09
Special Funds	2,575.00			2,575.00
Stocks	429,163.93			429,163.93
Bonds	1,250.00	(a) 340.00		1,590.00
Accts. Rec. Sub. Cos.	420,296.14			420,296.14
Notes Rec.—Stockholders	209,319.08			209,319.98
Land & Real Estate	16,752.68			16,752.68
Improvements	157,670.01		(b) 158.75	157,511.26
Furn. & Fix.	26,973.92		(c) 682.91	26,291.01
Autos	11,008.13		(d) 1,138.45	9,869.68
Prepaid Exp.	11,908.07			11,908.07
Total Assets	3,036,598.23			3,034,958.12
Liabilities:				
Deposits	78,274.22			78,274.22
Accts. Pay.	92,122.22			92,122.22
Accd. Taxes	22,290.23			22,290.23
Accd. Int.	694.64			694.64
Chas. Ilfeld—J. O. Acct	211,520.88			211,520.88
Chas. Ilfeld—Pension Fund	6,228.18			6,228.18
Res. for Depr.	136,308.84	(c) 3,432.25		132,876.59
Capital Stock—Preferred	340,000.00			340,000.00
Capital Stock—Common	1,222,700.00			1,222,700.00
Surplus	926,459.02	1,980.11	3,772.25	928,251.16
Total	3,036,598.23	5,752.36	5,752.36	3,034,958.12

[fol. 41]

EXHIBIT B-1

Explanation of Changes

(a) Same adjustment as item (d) Exhibit a.

(b) Adjustment as of December 31, 1928, per Item (e) Exhibit A.

(c) Adjustment to December 31, 1928, per Item (f) Exhibit A 12,168.61

Less:

Adjustments made on books during 1929 as follows:

Furn. & Fix. Exhaustions Magdalena		1,401.12	
Furn. & Fix. Exhaustions Las Vegas		10,714.99	
			12,116.11
			52.50
Adjustments for Exhaustions at Las Vegas:			
Exhaustions 1929		1,513.87	
Total credit on books in 1929	11,598.45		
Proportion applicable to exhaustions for years 1917 to 1919	10,714.99		
Balance applicable to 1920 exhaustions written-off 1929	883.46	883.46	
Excess 1929 exhaustions over books			630.41
Net adjustment			682.91
(d) Same as Item (g), Exhibit A.			
[fol. 42] (e) Adjustment as of December 31, 1928, Item (h), Exhibit A			11,831.90
Excess depreciation 1929, Exhibit E			1,352.38
			13,184.28
Adj. Depr. on sale Raton F. & F.		14.06	
Adj. Depr. on sale S. F. Auto		144.86	
			158.92
			13,025.36
Adj. Depr. on Raton Auto			240.00
			13,265.36
Less:			
Adjustments made on books during year for following:			
Excess Depr. Albq. F. & F. 1924-25		411.68	
Excess Depr. Albq. F. & F. 1927		16.18	
Excess Depr. Mag. F. & F. 1927		85.30	
Excess Depr. Albq. Bldg. 1927		176.11	
Excess Depr. Mag. Bldg. 1927		27.72	

Excess Depr. L. V. F. & F. 1927	252.77	
Excess Depr. Raton F. & F. 1927	359.83	
Excess Depr. Raton F. & F. 1927	200.00	
Excess Depr. H. O. Brown House 1927	13.14	
Excess Depr. S. F. F. & F. 1927	1.00	
		1,543.73
		11,721.63
Add Depr. Mag. F. & F. 1924-25	180.22	
Add Depr. Albq. Bldg. 1924-25	1,054.10	
Add Depr. Mag. Bldg. 1924-25	304.90	
Add Depr. L. V. F. & F. 1924-25	1,350.14	
Add Depr. L. V. Impr. 1924-25	306.96	3,196.32
		14,917.95

[fol. 43] Explanation of Changes

Balance forward		14,917.95
Mag. F. & F. Exhaustion 1927-28	1,401.12	
L. V. F. & F. Exhaustion 1927-28-29	11,598.45	
		12,999.57
		1,918.38
Exhaustions 1929:		
L. V. F. & F.		1,513.87
Adjustment as of December 31, 1929, to correct to amended balance as per Exhibit E		3,432.25

[fol. 44] EXHIBIT C

Analysis of Surplus and Reconciliation of Amended Surplus with Amended Taxable Net Income.

Item	Per Books	Amended
Surplus beginning of period	854,635.98	978,913.07
Add:		
Income per books and corrected taxable net income	249,196.60	190,167.77
Nontaxable income for period:		

Item		Per Books		Amended
Premium on Cap. Stock sold	50,374.78		50,374.78	
Dividends Rec.			66,320.00	
Other credits to surplus during period:				
Correction Erroneous charge 1928	60.00		60.00	
Excess depr. 1924-25	411.68			
Excess depr. 1927	1,132.05	301,175.11		306,922.55
		1,155,811.09		1,285,835.62
Deduct:				
Dividends (dates):				
2/19/29 Preferred 6%	20,400.00		20,400.00	
2/19/29 Common 15%	171,336.00		171,336.00	
Income taxes	28,517.55		28,517.55	
Income taxes deficiency for 1927	214.88		195.53	
Unallowable deductions:				
Premium paid on Cap. Stock purchased	5,687.32		5,687.32	
Donations			655.95	
Loss Springer Trading Company			86,116.05	
Loss Roy Trading Company			44,676.06	
Other charges to surplus during period:				
Additional Depr. R. A. R. 1924-25	3,196.32			357,584.46
		229,352.07		
Surplus end of period		926,459.02		928,251.16

[fol. 45]

Exhibit D

Reconciliation of Income per Books with Income per Return and with Taxable Net Income

Net Income per Books:		
Chas. Ilfeld Co.		249,196.60
Springer Trading Co.		3,054.23
Roy Trading Co.—Loss		—2,387.90
Total Net Income		249,862.93
Addition:		
Donation	655.95	
Loss on Liquidation Springer Trading Co.	7,736.88	
		8,392.83
		258,255.76

Deductions:		
Dividends Received	66,320.00	
Profit on Liquidation Roy Trading Company	2,515.77	
		68,835.77
Net income per return of taxpayer		189,419.99
Additions:		
(1) Excess depreciation	1,352.38	
(2) Adj. Profit on sale assets	81.08	1,433.46
		190,853.45
Deductions:		
(3) Increased loss Roy Trading Co.	140.02	
(4) Reduced Profit Springer Trading Co.	2,217.98	2,358.00
Taxable net income as per Schedule B		188,495.45

(1) See Item (a) Schedule 1. (3) See Item (a) Schedule 2.
(2) See Item (b) Schedule 1. (4) See Item (a) Schedule 3.

[fol. 46]

EXHIBIT E

Depreciation Summary

Exhibit	Corrected Values as of 12/31/29	Total Value	Amended Reserve 12/31/28	Depreciation 1929
E-1	92,415.74		79,728.03	6,343.85
E-2	21,078.16		11,553.56	1,228.98
E-3	17,162.36		11,988.93	858.12
E-4	5,326.08		1,953.50	266.30
E-5	3,069.65		1,353.39	153.49
E-6	1,000.00		200.00	50.00
E-7	2,314.68	142,366.67	965.70	92.58
E-8	7,560.59		4,708.92	873.75
E-9	141.67		68.23	14.16
E-10	5,879.63		2,763.36	604.98
E-11	2,314.13		815.78	382.44
E-12	10,123.70		4,087.46	1,012.37
E-13	271.29	26,291.01	135.64	67.82
E-14	4,308.29		1,538.07	822.78
E-15				
E-16	1,596.58		433.86	364.32
E-17	2,859.81		2,372.50	571.96
E-18	1,105.00	9,869.68	1,142.00	221.00
E-19	11,000.00			275.00
E-20	4,144.59	15,144.59		103.61
Total			125,808.93	14,307.51

[fol. 47]

Forward			125,808.93	14,307.51
Less:				
Debits to Reserve:				
For Exhaustions	5,617.21			
For Sales	1,622.64			7,329.85
				7,067.66
Amended Reserve			125,808.93	132,876.59
Total Depreciation Allowed				14,307.51
Total Depreciation Claimed				15,659.89
Increase or (Decrease)				—1,352.38

NOTE: Depreciation on Albuquerque Buildings, Exhibit E-1, computed on basis of life of lease running from January 1, 1911, to December 31, 1930, and on Magdalena Buildings, Exhibit E-2, on basis of life of lease running from October 1, 1916, to September 30, 1936.

EXHIBIT E-1

Depreciation Schedules

Year	Balance at Close of Period	Additions (Reductions)	Rate	Amended Reserve 12/31/28	Depreciation 1929
		Albuquerque Building			
1911-23	88,732.49	88,732.49	See note.		
1924	88,992.65	260.16			
1926	90,492.65	1,500.00			
1927	90,968.73	476.08			
1928	92,067.24	1,098.51			
1929	92,415.74	348.50		79,728.03	6,343.85
Depreciation Claimed					6,279.85
Increase or (Decrease)					64.00

EXHIBIT E-2

Magadalena Building

1917-23	21,068.56	21,068.56	See note.	11,553.56	1,228.98
Depreciation Claimed					1,186.71
Increase or (Decrease)					42.27

EXHIBIT E-3

Santa Rosa Building

1915-21	17,462.36	17,162.36	5%	11,988.93	858.12
Depreciation Claimed					858.12
Increase or (Decrease)					

[fol. 48]

EXHIBIT E-4

Year	Balance at close of period	Additions (reductions)	Rate	Amended reserve 12/31/28	Depreciation 1929
Salome Building—Magdalena					
July 1921	4,976.08	4,976.08	5%	1,866.00	248.80
1924.....	5,326.08	350.00		87.50	17.50
Total.....				1,953.50	266.30
Depreciation Claimed.....					266.30
Increase or (Decrease).....					

EXHIBIT E-5

Las Vegas Improvements					
1918-20....	3,069.65	3,069.65	5%	1,353.39	153.49
Depreciation Claimed.....					153.49
Increase or (Decrease).....					

EXHIBIT E-6

Auton Chico Dwelling					
1925.....	1,000.00	1,000.00	5%	200.00	50.00
Depreciation Claimed.....					50.00
Increase or (Decrease).....					

EXHIBIT E-7

H. O. Brown House—Las Vegas					
May 1926	2,314.68	2,314.68	4%	965.70	92.58
Depreciation Claimed.....					72.58
Increase or (Decrease).....					20.00

EXHIBIT E-8

Furniture and Fixtures—Albuquerque					
July 1919	2,353.34	(a)2,353.34	10%	2,235.65	117.69
July 1920	2,601.76	248.42		211.14	24.84
July 1921	2,930.36	328.60		246.45	32.86
Jan. 1922	3,314.15	383.79		268.65	38.38
Jan. 1923	3,867.10	552.95		331.80	55.30
Jan. 1924	4,853.60	986.50		493.25	98.65
Jan. 1925	4,867.80	14.20		5.68	1.42
Jan. 1926	6,028.42	1,160.62		348.18	116.06
Jan. 1927	8,133.06	2,104.64		420.92	210.46
Jan. 1928	9,605.02	1,471.96		147.20	147.20
Jan. 1929	9,913.93	308.91		.....	30.89
July 1929	7,560.59	(a)2,353.34—		.....	30.89
Total.....				4,708.92	873.75
Depreciation Claimed.....					1,066.66
Increase or (Decrease).....					—192.91

(a) Exhausted.

[fol. 49]

EXHIBIT E-9

Year	Balance at close of period	Additions (reductions)	Rate	Amended reserve 12/31/28	Depreciation 1929
Furniture and Fixtures—Magdalena					
July 1920	4.79	4.79	10%	3.78	.48
July 1921	37.85	33.06		24.81	3.30
Jan. 1924	83.77	45.92		22.95	4.59
Jan. 1925	88.23	4.46		1.78	.45
Jan. 1926	130.42	42.19		12.66	4.22
Jan. 1927	141.67	11.25		2.25	1.12
Total				68.23	14.16
Depreciation Claimed					7.90
Increase or (Decrease)					6.26

EXHIBIT E-10

Furniture and Fixtures—Las Vegas						
Jan. 1920	1,036.50	(a)	1,036.50	10%	1,036.50	.....
Jan. 1921	1,343.46	(a)	306.96		306.96	.....
Jan. 1922	1,513.87	(b)	170.41		153.39	17.02
Jan. 1923	1,536.07		22.20		13.32	2.22
Jan. 1924	2,171.47		635.40		317.69	63.54
Jan. 1925	2,261.94		90.47		36.20	9.05
Jan. 1926	3,552.20		1,290.26		387.09	129.03
Jan. 1927	5,858.85		2,306.65		461.33	230.66
Jan. 1928	6,367.66		508.81		50.88	50.88
Jan. 1929	7,393.50		1,025.84		.....	102.58
Jan. 1929	6,050.04	(a)	1,343.46—		.....	.....
Dec. 1929	5,879.63	(b)	170.41—		.....	.....
Total					2,763.36	604.98
Depreciation Claimed						1,438.03
Increase or (Decrease)						-833.05

(a) and (b) Exhausted.

EXHIBIT E-11

Furniture and Fixtures—Raton						
Apl. 1927	1,431.89	(a)	1,431.89	25%	626.45	251.72
July 1927	2,604.22		1,172.33	10	175.84	117.23
Jan. 1928	2,739.13		134.91		13.49	13.49
Jan. 1929	2,314.13	(a)	425.00—		.....	.....
Total					815.78	382.44
Depreciation Claimed						297.39
Increase or (Decrease)						85.05

(a) Sold. Sale Price 125.00. Depreciation sustained 185.94; Loss 114.06.

[fol. 50]

EXHIBIT E-12

Year	Balance at close of period	Additions (reductions)	Rate	Amended Reserve 12/31/28	Depreciation 1929
		Furniture and Fixtures—Santa Fe			
Mar. 1920	1,916.10	1,916.10	10%	1,672.47	191.61
July 1921	3,381.96	1,465.86		1,099.43	146.59
Jan. 1922	3,646.93	264.97		185.50	26.50
Jan. 1923	3,658.93	12.00		7.20	1.20
Jan. 1924	3,815.07	156.14		62.45	15.61
Jan. 1925	3,896.49	81.42		32.56	8.14
Dec. 1925	3,914.69	18.20		5.46	1.82
Jan. 1926	4,430.32	515.63		154.68	51.56
Dec. 1926	5,789.06	1,358.74		271.75	135.87
Jan. 1927	7,533.39	1,744.33		348.86	174.43
Jan. 1928	10,004.40	2,471.01		247.10	247.10
Jan. 1929	10,123.70	119.30		.....	11.94
Total				4,087.46	1,012.37
Depreciation Claimed					1,012.37
Increase or (Decrease)					.....

EXHIBIT E-13

Oil Equipment—Santa Fe

Dec. 1926	139.70	139.70	25%	69.84	34.92
Jan. 1927	271.29	131.59		65.80	32.90
Total				135.64	67.82
Depreciation Claimed					67.82
Increase or (Decrease)					.....

EXHIBIT E-14

Automobiles—Albuquerque

Dec. 1925	893.05	893.05	20%	714.26	.18
Dec. 1926	1,323.05	430.00	25%	215.00	107.50
Jan. 1927	2,584.00	1,260.95	20%	504.38	252.19
July 1928	3,382.94	798.94	20%	79.90	159.79
Nov. 1928	4,118.94	736.00	20%	24.53	147.20
Jan. 1929	4,393.94	275.00	20%	.....	55.00
Jan. 1929	3,500.89	(a) 893.05—		.....	.....
July 1929	4,308.29	807.40	25%	.....	100.92
Total				1,538.07	822.78
Depreciation Claimed				.....	953.16
Increase or (Decrease)				.....	—130.38

(a) Sold. Sale Price 200.00. Depreciation Sustained 714.44. Profit 21.39.

EXHIBIT E-15

Automobiles—Magdalena
None

[fol. 51]

EXHIBIT E-16

Year	Balance at close of period	Additions (reductions)	Rate	Amended Reserve 12/31/28	Depreciation 1929
		Automobiles—Santa Fe			
Aug. 1926	696.58	696.58	20%	336.60	139.32
Aug. 1928	1,596.58	900.00	25%	75.00	225.00
Nov. 1928	2,263.70 (a)	667.12		22.26	.....
Jan. 1929	1,596.58 (a)	—667.12		.....	.....
Total				433.86	364.32
Depreciation Claimed				.....	364.32
Increase or (Decrease)				.....	.....

(a) Sold. Sale Price 500.00. Depreciation sustained 22.26. Loss 144.86.

EXHIBIT E-17

Automobiles—Las Vegas and Santa Rosa

Jan. 1917	1,750.00 (a)	1,750.00	10%	1,750.00	.....
Jan. 1927	2,900.00	1,150.00	20%	460.00	230.00
Jan. 1928	3,712.50	812.50		162.50	162.50
Jan. 1929	1,962.50 (a)	1,750.00—		.....	.....
Jan. 1929	2,859.81	897.31		.....	179.46
Total				2,372.50	571.96
Depreciation Claimed				.....	571.96
Increase or (Decrease)				.....	.....

(a) Exhausted.

EXHIBIT E-18

Automobiles—Raton

Apl. 1927	800.00 (a)	—800.00	50%	700.00	.....
May 1927	1,905.00	1,105.00	20%	442.00	221.00
Nov. 1929	1,105.00 (a)	—800.00		.....	.....
Total				1,142.00	221.00
Depreciation Claimed				.....	221.00
Increase or (Decrease)				.....	.....

EXHIBIT E-19

Raton Building

July 1929	11,000.00	11,000.00	5%	.....	275.00
Depreciation Claimed				.....	550.00
Increase or (Decrease)				.....	—275.00

EXHIBIT E-20

Wilson House—Las Vegas

July 1929	4,144.59	4,144.59	5%	.....	103.61
Depreciation Claimed				.....	242.23
Increase or (Decrease)				.....	—138.62

[fol. 52] Roy Trading Company, Year 1929

EXHIBIT F

Balance Sheet —December 31, 1928

Assets	Per books	Debit	Credit	Amended
Notes Rec.	895.92			895.92
Accts. Rec.	329.83			329.83
Merchandise	1,030.00			1,030.00
Chas. Ilfeld Co. Cash a/c	6,131.82			6,131.82
Real Estate	1,904.40			1,904.40
Improvements	15,301.24			15,301.24
Total Assets	25,593.21			25,593.21
Liabilities				
Bills Payable C. I. Co.			(b)9,782.22	9,782.22
Res. for Depr.	8,099.15	140.02		7,959.13
Capital Stock	50,000.00			50,000.00
Surplus	—32,505.94	(c)9,782.22	(c) 140.02	—42,148.14
	25,593.21	9,922.24	9,922.24	25,593.21

Explanation of Changes

(a) Correcting reserve to amended figure.
(b) Restoration of bills payable to Charles Ilfeld Company cancelled in 1924, but disallowed as a deduction to the parent corporation.
(c) Net adjustment to surplus items (a) and (b).

EXHIBIT G

Analysis of Surplus and Reconciliation of Amended Surplus with Amended Taxable Net Income

	Per books		Amended
Surplus beginning of period	—32,505.94		—42,148.14
Add			
Income per books and with corrected taxable net income	—2,387.90	—2,527.92	
Other credits to surplus during period:			
Liquidated and Closed	34,893.84	44,676.06	
	32,505.94		42,148.14
Surplus end of period.			

[fol. 53] Springer Trading Co., Year 1929

EXHIBIT H

Balance Sheet—December 31, 1928

Assets	Per books	Debit	Credit	Amended
Accounts Rec.— C. I. Co.				
Cash a/c	508.96			508.96
Buildings	44,659.85			44,639.85
Side Walks	212.52			212.52
Heating Plant	247.89			247.89
Land	600.00			600.00
Furn. & Fix.		(a) 4,109.97		4,109.97
Total Assets	46,229.22			50,339.19
Liabilities				
Bills Payable C. I. Co.			(c) 69,030.27	69,030.27
Res. for Depr.	26,369.23	(b) 2,217.98	(a) 4,109.97	28,261.22
Capital Stock	40,000.00			40,000.00
Surplus	—20,140.01	(d) 73,140.24	(d) 6,327.95	—86,952.30
Totals	46,229.22	79,468.19	79,468.19	50,339.19

Explanation of Changes.

(a) Restoring furniture and fixtures which were charged off on books against depreciation reserve account fully exhausted but due to disallowance excess prior years not exhausted for income tax purposes.

(b) Correcting to amended figures.

(c) Restoration of bills payable to parent corporation account same disallowed as a charge off by parent company in 1924.

(d) Net adjustment to surplus of items (a) to (c) inclusive.

EXHIBIT D

Analysis of Surplus and Reconciliation of Amended Surplus with Amended Taxable Net Income

	Per books			Amended
Surplus beginning of period		—20,140.01		—86,952.30
Add				
Income per books and corrected taxable net income	3,054.23		836.25	
Other credits to surplus during period:				
Liquidated and Closed	17,085.78		86,116.05	
		20,140.01		86,952.30
Surplus end of period				

[fol. 54] Charles Ilfeld Company, Year 1929

Statement of Total Tax Liability

Year	Tax previously assessed	Adjustment proposed in accompanying report: Deficiency	Adjustment proposed in accompanying report: Overassessment	Correct tax liability
1929	20,836.20		103.83	20,732.37

RODNEY B. HORTON, called as a witness on behalf of the plaintiff, after being duly sworn, testified as follows:

Direct examination.

By Mr. Hannett:

I am a certified public accountant. I personally audited the books of the Charles Ilfeld Company for the purpose of making up an amended tax return for that company for the year 1929. I examined the books, and familiarized myself with all of the facts and figures necessary for making this report. I have seen the report of Mr. Warner Blair, received in evidence as Plaintiff's Exhibit A. The capital investment of the Charles Ilfeld Company in the Springer Trading Company was $40,000 made in the latter part of 1917.

By Mr. Hannett:

Q. I will change the question this way. Mr. Horton, if you know, when was each of these subsidiary companies, the Springer Trading Company and the Roy Trading Company, dissolved and the affiliation broken?

A. What was the date?

Mr. Harpole: Objected to as calling for a conclusion from the witness.

By the Court: Overruled.

Mr. Harpole: Exception.

Q. Yes.

A. November, 1929.

The business of the subsidiaries was wound up as of that date and all of their assets turned into cash during the year 1929. The final transaction of turning the assets of the two subsidiaries into cash occurred in November, 1929. The general ledger of the Charles Ilfeld Company discloses the final distribution of the cash of the subsidiaries [fol. 55] was made to the parent company on December 23, 1929. It became the property of the Charles Ilfeld Company on that date.

By Mr. Hannett:

Q. Can you state from the books that you have in your hands, and the other books of the Charles Ilfeld Company

that you have examined, whether or not the payment, the liquidation of the two subsidiary companies, and the payment of this cash to the parent company had any relation to the cancellation of the stock of the corporation?

A. Yes, sir.

Mr. Harpole: Objected to.

By the Court: Overruled.

Q. Did it have any relation?

A. No, sir.

Q. There was no relation between the cancellation of the stock and the taking up of the stock of the corporation to the payment to the parent corporation of this liquidated dividend?

Mr. Harpole: Objected to as calling for a conclusion of the witness.

By the Court: Overruled.

Mr. Harpole: Exception.

A. None whatever.

There was charged off on the books of the Charles Ilfeld Company, as a loss, the original capital investment of these two subsidiaries and the loans made to these two companies. My findings and Mr. Blair's are exactly in accord as to the statistical data. It was charged off as of December 31, 1929, in his report and shows in his analysis surplus. The subsidiary companies never paid to the parent company any sum or anything in kind to apply on their investment or loans except the liquidated dividend. The amount of liquidated dividend paid by each corporation was, Springer Trading Company $22,914.22. This shows a loss of $86,-116.05. The liquidated dividend paid by the Roy Trading Company was $15,106.16. The capital investment and loans was $59,782.22, showing a loss of $44,676.06.

[fol. 56] Cross-examination.

By Mr. Harpole:

It is my interpretation that the Springer Trading Company and the Roy Trading Company were dissolved in November, 1929. The entire assets were converted into cash as of that date. When a corporation converts into cash

it certainly liquidates, in my mind. In this report Mr. Blair says it is dissolved and I take the same position. Charles Ilfeld Company owned 100 per cent of the stock of each subsidiary until they liquidated and dissolved in November, 1929. That is your agent's report. They went into a complete liquidated state on that date. Thew owned nothing except money. On December 23, or a month later, they paid this money over to the Charles Ilfeld Company. I do not know what happened to the stock of the subsidiary companies. We never could find it. So far as I know, it may be outstanding somewhere. The charter was surrendered December 30, 1929.

The minutes of the corporation, subsidiaries, show that "A special meeting of the stockholders of the Springer Trading Company was held at the office of the Charles Ilfeld Company at Las Vegas, New Mexico, the 30th day of December, 1929, pursuant to written waiver of this meeting signed by all stockholders. Present, Charles Ilfeld Company, by Louis C. Ilfeld, proxy, representing 397 shares; Herman C. Ilfeld, 1 share; Arthur C. Ilfeld, 1 share; Louis C. Ilfeld, 1 share. They being the holders of all of the issued capital stock of the corporation. The meeting was called to order by the President. The waiver of notice of the meeting, signed by all of the stockholders, was read and ordered filed. The President stated that the special business to come before the meeting was the consideration and ratification of the resolution passed by the Board of Directors at its meeting this day held, with reference to the filing in the office of the State Corporation Commission of New Mexico of a Certificate of Suspension of Business of the corporation. Upon motion duly made, seconded and unanimously carried, it was resolved that the action of the Board of Directors at its meeting this day held in preparing and filing in the office of the State Corporation Commission of New Mexico of a Certificate of Suspension of Business of the corporation be, and the same is hereby ratified and approved. There being no further business to transact, the meeting adjourned. Signed, Arthur C. Ilfeld, President, Herman C. Ilfeld, Secretary." [fol. 57] This is a receipt from the State Corporation Commission, "received of the Springer Trading Company by Louis C. Ilfeld $1, total $1", for the suspension of business. This receipt is dated January 2, 1930, on an elapse

of time between the meeting and the time it reached Santa Fe. The date is December 30, which shows the dissolution. The same is true of the Roy Trading Company. Those minutes and the receipt are not the only things to show the dissolution of the subsidiary companies. The entries in the books show it. These entries refer to the final winding-up of their affairs. The Springer Trading Company final wind-up was December 23. The entry says "final settlement". I verified the items set out on page 4 of Plaintiff's Exhibit A. The items at the top are operating losses. They were deducted in the consolidated returns from the net income of the Charles Ilfeld Company for the various taxable years. Those deductions served to reduce the income tax liability of the Charles Ilfeld Company for the various years. During the years 1918 to 1929, Charles Ilfeld Company asked for and received deductions on its consolidated income tax returns because of operating losses sustained by the Springer Trading Company, its subsidiary, in the amount of $141,424.41, less $1,238.00 in gains. It asked for and was allowed in the years 1921 to 1929, inclusive, the amount of $61,535.17, less $4,407.32, as operating losses sustained by the Roy Trading Company, its subsidiary.

I first made an audit of the Charles Ilfeld Company books in 1930. I was employed to make an annual audit and prepare its income tax returns. I had not done that for prior years. I have an interest in the outcome of this action. That interest is a contingent fee.

Neither of the subsidiaries transacted any business whatever after the month of November, 1929. They were completed, wound up. From the standpoint of an auditor and from an accounting standpoint that is true.

[f. l. 58] Louis C. Ilfeld, called as a witness on behalf of the plaintiff, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Hannett:

I was a director and I think I was assistant secretary of the Charles Ilfeld Company in 1929. I can't tell you ex-

actly what became of the certificates of stock of the subsidiary corporations, the Roy Trading Company and the Springer Trading Company.

RECITAL AS TO DEFENDANT'S EXHIBITS

Thereupon the following exhibits were offered by the defendant and received in evidence without objection on the part of the plaintiff:

Defendant's Exhibit No. 1.—Original Parent Return. (Exhibit consists of certified copy, certificate omitted.)

Defendant's Exhibit No. 2.—Amended Parent Return. (Exhibit consists of certified copy, certificate omitted.)

Defendant's Exhibit No. 3.—Authorization and Consent of Subsidiary Corporation Included in a Consolidated Income Tax Return and Return of Information—Roy Trading Company. (Exhibit consists of certified copy, certificate omitted.)

Defendant's Exhibit No. 4.—Authorization and Consent of Subsidiary Corporation Included in a Consolidated Income Tax Return and Return of Information—Springer Trading Company. (Exhibit consists of certified copy, certificate omitted.)

The foregoing constitutes all of the evidence introduced by the plaintiff and defendant as material to and relating to the cause of action alleged in the complaint. Thereupon plaintiff rested his case and defendant made and filed a written motion for judgment as follows:

DEFENDANT'S MOTION FOR JUDGMENT

Comes now the defendant, B. C. Hernandez, through his attorneys, Hugh B. Woodward, United States Attorney for the District of New Mexico, Dudley Cornell, Assistant United States Attorney for said District, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, and moves the Court for judgment in behalf of the defendant upon the ground and for the reason that the evidence in-

[fol. 59] troduced by the plaintiff is insufficient to support a judgment in his favor.

Dated — day of ——, 1932.

Hugh B. Woodward, U. S. Attorney, Dudley Cornell, Asst. U. S. Attorney, Eugene Harpole, Special Attorney, Bureau of Internal Revenue, Attorneys for Defendant.

Thereupon defendant rested its case. After hearing argument by counsel for the respective parties, the Court announced as follows:

By the Court: I think under the decisions cited by plaintiff, that the plaintiff is entitled to recover in this case. Judgment, therefore, will be for the plaintiff.

Mr. Harpole: Exception.

Thereafter on the 17th day of August, 1932, defendant prepared and presented to the Court, Special Findings of Fact and Conclusions of Law, together with the request for the adoption of the same, in words and figures as follows:

Request for Special Findings of Fact and Conclusions of Law omitted, printed side page 13, ante.

[fols. 60-65] Requested Findings of Fact and Conclusions of law omitted, printed side page 13, ante.

[fols. 66-71] Whereupon the Court accepted the proposed Findings of Fact and Conclusions of Law submitted by the plaintiff, and adopted, made and entered the same as its Findings of Fact and Conclusions of Law herein and rejected the Special Findings of Fact and Conclusions of Law submitted by the defendant with the exception of the defendant's requested Findings of Fact numbered XII, XIII and XIV, which the Court adopted, to which the defendant noted an exception, the said Findings of Fact and Conclusions of Law as adopted by the Court being in words and figures as follows:

Findings of Fact and Conclusions of Law omitted, printed side page 20, ante.

[fol. 72] STIPULATION AS TO BILL OF EXCEPTIONS

It is hereby stipulated and agreed by and between the attorneys for plaintiff and defendant that the foregoing Bill of Exceptions has been presented in time, that it contains all evidence given and proceedings had at the trial of this action material to the appeal of defendant and appellant; and that it may be approved, allowed and settled by the Judge in the above entitled court as correct in all respects; that the same shall be made a part of the record in said case and be the Bill of Exceptions therein; that said Bill of Exceptions may be used by either plaintiff or defendant upon any appeal taken by either plaintiff or defendant.

Dated this 19th day of December, A. D. 1932.

A. T. Hannett, Attorney for Plaintiff, Hugh B. Woodward, United States Attorney, Dudley Cornell, Assistant United States Attorney, Alva C. Baird, Special Attorney, Bureau of Internal Revenue; Eugene Harpole, Special Attorney, Bureau of Internal Revenue, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing Bill of Exceptions duly proposed, agreed upon by counsel for the respective parties, contains all evidence given and proceedings had in the trial of this action material to the appeal of defendant and appellant. It is correct in all respects and is hereby approved and allowed and settled and made a part of the record herein and said Bill of Exceptions may be used by the parties plaintiff and defendant on any appeal taken by either party plaintiff or defendant.

Dated this 21st day of December, A. D. 1932.

Colin Neblett, United States District Judge.

[fol. 73] Copy

DEFENDANT'S EXHIBIT No. 1

Corporation Income Tax Return for Calendar Year 1929

File This Return with the Collector of Internal Revenue for Your District on or Before March 15, 1930.

Form 1120. Treasury Department, Internal Revenue Service.

(Auditor's Stamp.)

Closed. Overassessment. Tax: $103.83. Interest: —. Penalty: —. Serial No. 218,6052. Date of ar: 12/4/31. Adjusted by L. B. V. Div. AR. Sec. E. Unit 6. Date: 4/7/32. Recd. CC by ——. Date: CCMN 4/11/32.

Print plainly corporation's name and business address: Charles Ilfeld Company, Las Vegas, New Mexico.

Date of Incorporation: 1906.

Under the Laws of what State or Country: New Mexico.

Page 1 of Return.

File Code, 92.

Serial Number: 43002.

(Cashier's Stamp:) Collector Internal Revenue. Paid March 18, 1930. District of New Mexico. Cash, Check (xx), M. O. Cert. of Ind.

First Payment: $5,209.05.

Carded As: New Mexico.

Kind of Business: Wholesale General Merchandise. Is This a Consolidated Return of Two or More Corporations? Yes.

Gross Income

Item and Instruction No.			
1. Gross Sales from Trading or Manufacturing, Less Returns and Allowances			$4,245,930.94
2. Less Cost of Goods Sold:			
(a) Inventory at beginning of year	$901,776.06		F
(b) Merchandise bought for sale	3,504,049.30		E
(c) Cost of manufacturing or producing goods (From Schedule A)			L
			D
(d) Total of lines (a), (b), and (c)	$4,405,825.36		
(e) Less inventory at end of year	735,069.03		3,670,756.33
3. Gross Profit from Trading or Manufacturing (Item 1 minus Item 2)			$575,174.61
4. Gross Profit from Operations Other Than Trading or Manufacturing.			
[fol. 74]			
(State source of income):			
(a) COLLECTOR INTERNAL REVENUE			
(b) RECEIVED Mar. 15, 1930			
(c) Distfict of New Mexico			
5. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds	68,618.40		
6. Rents	4,639.45		
7. Royalties			
8. Profit from Sale of Real Estate, Stocks, Bonds, and other Capital Assets (From Schedule B)	1,972.57		
9. Dividends on Stock of Domestic Corporations	66,320.00		

Item and Instruction No.			
10.	Other Income (including dividends received on stock of foreign corporations). (State nature of income):		
	(a)	66,449.73	
	(b)		
	(c)		
11.	Total Income in Items 3 to 10		$783,174.76
	Deductions		
12.	Compensation of Officers (From Schedule C)	$46,600.00	
13.	Rent on Business Property	11,350.03	
14.	Repairs (From Schedule D)	4,323.24	
15.	Interest	35,190.14	
16.	Taxes (From Schedule E)	36,465.72	
17.	Losses (From Schedule F)		
18.	Bad Debts (From Schedule G)	42,425.29	
19.	Dividends (From Schedule H)	66,320.00	
20.	Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (From Schedule I)	15,659.89	
21.	Depletion of Mines, Oil and Gas Wells, Timber, etc. (Submit schedule, see Instruction 21)		
22.	Other Deductions Not Reported Above. (Explain below, or on separate sheet):		
	(a) Salaries and wages. (Not included in Item 2, 12, or 14 above)		
	(b) Net Loss for prior year. (Submit schedule)		
	(c)	335,400.46	
	(d)		
	(e)		
	(f)		
23.	Total Deductions in Items 12 to 22		$593,754.77
24.	Net Income (Item 11 minus Item 23)		$189,419.99
	Computation of Tax		
25.	Net Income (Item 24 above)		$189,419.99
26.	Less Credit of $3,000 (for a domestic corporation having a net income of less than $25,360)		
27.	Balance (Item 25 minus Item 26)		$189,419.99
28.	Income Tax (12% of Item 27)		$20,836.20
29.	If net income of domestic corporation is less than $25,360, enter the amount over $25,000		
30.	Total Tax (Item 28 plus Item 29)		$20,836.20

[fol. 75]

31.	Less: Income Tax Paid at Source. (This credit can only be allowed to a nonresident foreign corporation)		
32.	Income Tax Paid to a Foreign Country or U. S. possession by a domestic corporation (see Inst. 27)		
33.	Balance of Tax (Item 30 minus Items 31 and 32)		$20,836.20

An amended return must be marked "Amended" at top of return. Checks and drafts will be accepted only if payable at par.

SCHEDULE B

Charles Ilfeld Company and Affiliated Companies

Profit Sale of Capital Assets

Item	Cost	Prior Depreciation	Amount received	Gain Loss
Dodge Car	800.00	460.00	200.00 Loss	140.00
Motor	350.00	165.00	100.00 Loss	85.00
Burroughs Machine	75.00	35.00	25.00 Loss	15.00
Land, buildings, etc. of Roy Trading Co.	17,205.64	8,099.15	8,170.09 Loss	936.40
Land, buildings, etc. of Springer Trading Company	45,720.26	26,369.23	22,500.00 Gain	3,148.97
NET GAIN				1,972.57

Schedule 10 a

Other Income

Tie trading	108.18
Recoveries of accounts	12,157.34
Miscellaneous	143.77
Fire adjustment	1,964.67
Bean trading	1,375.67
Discount earned	49,864.04
Hides, pelts	237.47
Group insurance	252.20
Parcel post	346.39
	66,449.73

Schedule 22 c

Other Reductions

Hardware catalog	2,837.76
Discount	31,730.64
Attorney fees	288.73
Collection expense	640.96
Miscellaneous	159.02
[fol. 76] Groissant & Aldredge beans	169.28
Ernst & Ernst audit	2,640.71
Insurance, Schoonmaker—Springer	207.37
Advertising	2,615.65
Auto expense	3,104.03
Flood protection	300.00
Dues	1,990.96
General expense, audit, etc	4,919.85
Insurance, fire	9,101.34

Group insurance	1,527.68
Light, heat, water	2,970.57
Postage	4,821.08
Salaries	209,212.30
Stationery	3,657.63
Telegraph and tel.	4,561.37
Auditors traveling	597.60
Traveling	17,498.49
Sundries	10,044.84
Collection charges	215.35
Commissions paid, DG	10,201.46
Commissions paid-Groc	4,792.50
Commissions paid hardware	1,994.15
Office supplies	627.72
Store supplies	865.05
Drayage	1,106.37
	305,400.46

Schedule G

Bad Debts

1929

Watrous Merc	58.04
Atanecio Sena	559.58
A. Herrera	108.00
B. F. Romero	3.25
Las Vegas Poultry Association	42.49
G. Garcia	5.78
Jno. Leonard	45.00
Annie Lee	2.35
Grease Spot	89.92
G. C. Pagan	150.00
[fol. 77] B. Piacenza	16.08
J. B. Fernandez	61.93
Atchison-McCue	168.22
W. H. Ball	19.74
M. Biehl	91.46
Ralph Ciddio	11.65
County of San Miguel	250.00
Ike Davis	321.75
Mrs. A. Delgado	192.67
A. R. Gutierrez	624.44

T. M. de Herrera	103.28
Chester Hunker	47.90
L. V. Hardware & Furn. Co.	1.61
Lobby Pool Hall	5.64
Manuel E. Martinez	48.52
Luis Montano	358.00
Pastime Pool Hall	111.45
Elmer Pettine	37.72
Mike Pettine	280.88
Felipe Quitana	611.21
Chamber of Commerce	100.00
Sec. Romero	505.13
Mrs. H. Voght	62.32
C. W. Wildenstein	192.61
Chocolate Shop	406.05
W. G. Ogle	14.90
S. E. Allison	541.36
A. Baer & Co.	200.00
Coury Merc. Co.	28.47
M. Dorrance	77.33
R. Garcia y Sanchez	242.53
Gonzales and Son	144.64
F. Griego	59.22
E. C. Holderman	6.51
J. B. Jones	45.08
Justiano Leyba	16.93
Alex Ledoux	32.49
A. Lobato	385.74
Emma Longnecker	600.00
Jose Martinez	52.06
[fol. 78] James Martin	150.00
Ed. Montoya	188.50
Candido Ortega	32.60
F. Padilla	1,000.00
Ribera Merc. Co.	30.74
C. J. Romero y Lopez	255.83
Victor Sena	3.59
W. P. Blake	358.51
Blue Parrot	365.73
F. L. Darlington	10.92
A. J. Heitzman	237.03
Lail Supply Co.	10.66
Nick Luciana	200.92

Abe Mickenay	150.00
F. C. Olmstead	604.08
B. F. Robinson	134.30
J. M. Starkey	5.00
Stern & Nahm	851.96
J. M. Simmons	3,000.00
Rev. E. Scull	356.54
Miners Trading Co.	325.00
J. H. Reynolds	1,400.00
F. Angel	325.63
Dan Booth	33.18
Jos. Danziger	1,250.00
L. L. Leal	19.07
R. D. Irwin	127.15
N. Luciana	93.56
J. O. Maddux	43.55
Lydia Meffort	150.00
Joe Mitchell	439.76
Pack Merc. Co.	200.00
Vic Padilla	8.82
R. O. Pittman	69.78
Bad check	1.00
Miners Trading Co.	250.00
L. Garcia	1,307.95
Luciana R. Baca	25.77
Bridge Street Market	44.50
[fol. 79] C. Collins	100.00
Fire Fighters	171.80
(Las Vegas Books)	22,476.36
Central Merc. Co.	20.80
Baca Bros.	10.00
San Jose Market	10.00
Breen Service	3.88
Jno. Seth	7.50
Mrs. A. J. Salas	10.83
Regensberger Tire Co.	23.86
Sargent & Martin	14.67
Bond and Nohl	9.60
W. H. Olum	10.00
H. L. Craig	4.49
Gus Mitchell	2.25
Albuquerque Used Car	17.25

T. V. Allen	134.03
Central Grocery	927.57
Crescent Dairy	15.43
Do Nut Shop	139.30
Gasper Garcia	39.73
Hotel Monkbridge	18.47
E. F. Hulick	29.43
Ralph Houston	10.00
Wm. Kenworthy	69.61
Richard Lewis	480.68
McSpadden Grocery	2,173.51
National Guard	36.83
L. Olivia	9.83
Panhandle Roofing Co.	12.00
Mrs. A. J. Salas	14.58
T. Errerez Mortuary	2.90
J. E. Withers, Jr.	73.08
Walker Allen	300.00
A. Herrera	465.55
Geo. Abousleman	194.81
A & P Garage	62.73
Frank Baca	483.10
Jake Barboa	158.06
[fol. 80] Brooklyn Cottage	1.22
Catron County	292.40
Central Merc. Co.	124.63
Co-operative Store	91.50
A. Eichwald Estate	763.10
R. L. Ferguson	5.57
A. Gallegos	87.83
Grants Merc. Co.	1,552.20
Tom Greer	56.30
E. E. Hamm	283.72
T. W. Herron	33.70
T. E. Holman	98.84
Hot Springs Laundry	97.96
King, Nilsen Co.	52.72
Fred Landwehr	243.56
O. L. Luna	45.70
Magdalena Market	312.91
Mehrens Chevrolet Co.	47.34
Jno. Nigro	4.50
No Name Grocery	63.78

Mrs. M. Roberts	77.11
San Marcial Merc.	929.65
San Ysidro Trading Co.	1,354.61
H. Smith	20.50
Ira Sweazea	1,225.27
E. W. Thomas	4.13
Gary Oil Co.	345.79
San Marcial Drug	30.13
Lujan & Chavez	55.21
B. M. Meyer	2,000.00
W. M. Smith	100.00
Meliton Torres	500.00
Andres C. DeBaca	43.53
Fred Balling	1,486.73
Martinez Bros.	52.95
Albert Livermore	103.33
McHorse and Rooney	71.42
N. F. Martinez	384.81
Elisio Ortega	13.60
J. D. Rael	34.95
[fol. 81-] Ben Seiler	684.60
L. G. White	196.57
	19,969.93
Total Las Vegas Books	22,476.36
Total Albuquerque Books	19,969.93
Schedule G'	42,446.29

SCHEDULE I

Depreciation

Las Vegas, New Mexico

		1929	Prior
Santa Rosa Building:			
Indeterminate Lease cost plus additions 12/31/28	17,162.36	.....	.....
No additions 1929—5%	.....	858.12	11,988.93
Raton Building:			
Cost 1929—5%	11,000.00	550.00	.....
Salome Building:			
Cost plus additions 12/31/28	5,484.83	.....	.....
No additions 1929—5%	.....	266.30	1,953.50
Salome Land	500.00	.....	.....
Wilson House:			
Cost 1929—5%	4,144.59	242.23	.....
Wilson House, Land	700.00	.....	.....

		1929	Prior
Anton Chico House:			
Cost 12/31/28	1,000.00		
No additions 1929—5%		50.00	200.00
Anton Chico Land	144.75		
Brown House, 12/31/28	2,134.68		
No additions 1929—4%		72.58	965.70
Brown Land	800.00		
Real Estate	10,607.93		
E. Lucero Property:			
Cost 1929	4,000.00		
[fol. 82]			
Las Vegas Equipment 12/31/28	17,135.15		
Additions 1929	1,025.84		
	18,160.99		
Less exhausting after 1929 depreciation	11,598.45		
Rates, various	6,562.54	1,438.03	2,314.00
Raton Equipment 12/31/28	2,739.13		
Deductions 1929	425.00		
Rates, various	2,314.13	297.39	448.79
Las Vegas Improvements	3,069.65		
No additions 1929—5%		153.49	1,353.39
Autos, Las Vegas 12/31/28	3,712.50		
Deductions after 1929 depreciation	1,750.00		
	1,962.50	392.50	622.50
Auto, Santa Rosa:			
Cost 1929	897.31	179.46	
Auto, Raton:			
Cost 12/31/28	1,905.00		
Deductions 1929	800.00		
	1,105.00	221.00	442.00
Albuquerque Building:			
Lease 1/1/11 to 12/31/20	92,067.24		
Additions 1929	348.50		
	92,415.74		
Less prior amortization	79,811.04		
	12,604.70		
½ remaining (on 12,559.70)		6,279.85	79,811.04
[fol. 83]			
Magdalena Building:			
Lease 10/1916 to 9/30/36	21,078.16		
No 1929 additions			
Less prior amortization	11,584.35		
	9,493.81		
1/8 of remaining		1,186.71	11,584.35
Albuquerque Furniture and equipment 12/31/28	9,605.02		
Additions 1929	308.91		
	9,913.93		
Less exhaustions	2,353.34		
	7,560.59		
10%		756.06	
To adjust with revenue agent's report		310.60	2,424.19

		1929	Prior
Santa Fe Furn. & Fixtures:			
Cost plus additions 12/31/28	10,123.70		
No additions 1929—10%		1,012.37	4,034.36
Santa Fe Oil Equipment:			
Cost 12/31/28	271.29		
No additions 1929—25%		67.82	135.64
Autos, Santa Fe	1,396.58		
Cost 12/31/28			
No additions 1929		364.32	573.30
Autos, Albuquerque:			
Cost 12/31/28	4,118.94		
Additions 1929	189.35		
	4,308.29	953.16	952.77
Furniture and fixtures:			
Magdalena	2,681.24		
No additions 1929			
Exhaustions	1,401.12		
Depreciation	1,280.12	7.90	844.49

[fol. 84]

Recapitulation

Depreciation

	Cost	1929	Prior
Santa Rosa Building	17,162.36	858.12	11,988.93
Raton Building	11,000.00	550.00	
Salome Building	5,484.83	266.30	1,953.50
Salome Land	500.00		
Wilson House	4,144.59	242.23	
Wilson Land	700.00		
Anton Chico House	1,000.00	50.00	200.00
Anton Chico Land	144.75		
H. O. Brown House	2,314.68	72.58	965.70
Brown Land	800.00		
Real Estate	10,607.93		
F. Lucero Property	4,000.00		
Las Vegas, equipment	6,562.54	1,438.03	2,314.00
Raton equipment	2,314.13	297.39	448.79
Las Vegas improvements	3,069.65	153.49	1,353.39
Autos, Las Vegas	4,962.50	392.50	622.50
Autos, Santa Rosa	897.31	179.46	
Autos, Raton	1,105.00	221.00	442.00
Albuquerque building	92,415.74	6,279.85	79,811.04
Magdalena Building	21,078.16	1,186.71	11,584.35
Albuquerque Fur. & Fixt.	7,560.59	1,066.66	2,424.19
Santa Fe Furn. & Fixt.	10,123.70	1,012.37	4,034.36
Santa Fe Oil & Equipment	271.29	67.82	135.64
Santa Fe, autos	1,596.58	364.32	573.30
Albuquerque, autos	4,308.29	953.16	952.77
Magdalena Furn. & Fixt.	1,280.12	7.90	844.49
	212,404.74	15,659.89	120,648.95

[fol. 85]

Operating Statement

1929

Item	Charles Ilfeld Company	Springer Trading Company	Roy Trading Company	Total
1. Gross sales	4,245,855.94	.....	75.00	4,245,930.94
2. Cost of goods sold				
Inventory beginning of period	900,746.06	.....	1,030.00	901,776.06
Purchases	3,504,049.30	.....	.....	3,504,049.30
Total	4,404,795.36	.....	1,030.00	4,405,825.36
Inventory end of period	735,069.03	.....	.....	735,069.03
	3,669,726.33	.....	1,030.00	35,670,756.33
3. Gross trading profit	576,129.61	.....	Loss 955.00	575,174.61
5. Interest earned	68,618.40	.....	.....	68,618.40
6. Rents received	1,758.45	2,563.50	318.50	4,639.45
8. Profit sale capital assets	Loss 240.00	3,148.97	Loss 936.40	1,972.57
9. Dividends domestic corporations	66,320.00	.....	.....	66,320.00
10. Other income	65,869.61	150.00	430.12	66,449.73
11. Total income	778,456.07	5,861.47	Loss 1,142.78	783,174.76
12. Compensation officers	46,600.00	.....	.....	46,600.00
13. Rent paid	11,306.53	43.50	.....	11,350.03
14. Repairs	2,593.74	1,473.35	256.15	4,323.24
15. Interest paid	35,190.14	.....	.....	35,190.14
16. Taxes	35,760.30	694.94	10.48	36,465.72
18. Bad debts	42,445.29	.....	.....	42,445.29
19. Dividends domestic corporations	66,320.00	.....	.....	66,320.00
20. Depreciation	15,659.89	.....	.....	15,659.89
22. Other deductions	333,826.52	595.45	978.49	335,400.46
23. Total	589,702.41	2,807.24	1,245.12	593,754.77
24. Net income	188,753.66	3,054.23	Loss 2,387.90	189,419.99

Chas. Ilfeld Co. and Affiliated Companies, Las Vegas, New Mexico, 1929

Balance Sheet 12/31/28

	Charles Ilfeld Company	Roy Trading Company	Springer Trading Company	Eliminations	Total
Assets					
CURRENT:					
Cash	321,334.09				321,334.09
Notes Receivable	107,439.05	895.92			108,334.97
Accounts receivable	567,528.83	329.83			567,858.66
Merchandise, Regular	900,767.94	1,030.00			901,797.94
Merchandise, other	17,075.50				17,075.50
Special funds	2,850.00				2,850.00
Total	1,916,995.41	2,255.75			1,919,251.16
PERMANENT ASSETS	212,665.97	17,205.64	45,720.26		275,591.87
DUE FROM SUBSIDIARIES	614,646.71	6,131.82	508.96	6,640.78	614,646.71
NOTES RECEIVABLE STOCKHOLDERS	94,783.74				94,783.74
BONDS	1,250.00				1,250.00
STOCK IN SUBSIDIARIES	459,842.62			43,241.49	416,601.13
OTHER ASSETS	4,362.31				4,362.31
	3,304,546.76	24,593.21	46,229.22	49,882.27	3,326,486.92
Liabilities					
CURRENT:					
Notes payable	52,195.07				52,195.07
Accounts payable	69,669.73				69,669.73
Accrued expense	21,194.79				21,194.79
Personal & sundry accounts payable	23,019.11				23,019.11
Accrued interest	793.93				793.93
Total	166,872.63				166,872.63
DEPRECIATION	137,640.33	8,099.15	26,369.23		172,109.21
DUE SUBSIDIARIES	232,964.67			6,640.78	226,323.67
DEFERRED INCOME	792.05				792.05
DUE CHARLES ILFELD JOINT OWNERSHIP	429,400.82				429,400.82
CAPITAL STOCK A	1,104,900.00	50,000.00	40,000.00	90,000.00	1,104,900.00
CAPITAL STOCK B	37,340.00				37,340.00
CAPITAL STOCK PREFERRED	340,000.00				340,000.00
SURPLUS EARNED	817,730.02	Deficit 32,505.94	Def. 20,140.01	Ded. 46,758.51	811,842.58
SURPEUS PAID IN	36,905.96				36,905.96
	3,304,546.76	25,593.21	46,229.22	49,882.27	3,326,486.92

[fol. 87] Balance Sheet, December 31, 1929

Assets:	
Current —	
Cash	374,783.59
Notes receivable	95,222.55
Accounts receivable	541,300.01
Merchandise Inventory	735,069.03
Special funds	2,575.00
Miscellaneous inventories	3,306.09
Total current	1,752,256.27
Permanent assets	212,404.74
Due from subsidiaries	420,296.14
Notes receivable, stockholders	209,319.08
Bonds	1,250.00
Stock in subsidiaries	429,163.93
Other sundry assets	11,908.07
	3,036,598.23
Liabilities:	
Current —	
Notes payable	69,042.76
Accounts payable	92,422.22
Accrued expense	22,290.23
Personal & sundry accounts payable	8,931.46
Accrued interest	694.64
Total current	193,381.31
Charles Ilfeld Pension Fund	6,228.18
Due Charles Ilfeld Joint ownership	211,520.88
Depreciation	136,308.84
Capital stock:	
Common A	1,185,600.00
Common B	37,100.00
Preferred	340,000.00
Surplus	926,459.02
	3,036,598.23

[fol. 88] Reconciliation of Net Income and Analysis of Surplus

	Charles Ilfeld Company		Roy Trading Company	Springer Trading Company	Total
Taxable income	188,753.66	Loss	2,387.90	3,054.23	189,419.99
Less Non deductible items:					
Donations	655.95				
Springer Trading Co. stock	7,736.88				
Total	8,392.83				8,392.83
Balance	180,360.83	Loss	2,387.90	3,054.23	181,027.16
Non-taxable income:					
Dividends	66,320.00				
Roy Trading Co. stock	2,515.77				
Total	68,835.77				68,835.77
Income per books	249,196.60	Loss	2,387.90	3,054.23	249,862.93
Surplus 12/31/28	854,635.98	Def.	32,505.94	20,140.01 Def.	801,990.03
Total	1,103,832.58	Def.	34,893.84	17,085.78 Def.	1,051,852.96
Additions to surplus:					
Income tax	60.00				
Revenue agents adjustments	1,543.73				
Premium stock sold	50,374.78				51,978.51
Roy Trading Co. and Springer Trading Co. liquidated and corporations suspended			34,893.84	17,085.78	51,979.62
Totals	1,155,811.09				1,155,811.09
Deductions:					
6% preferred dividend	20,400.00				
15% common dividend	171,336.00				
Premium stock purchased	5,687.32				
Federal income tax	28,517.55				
Revenue agents adj.	3,196.32				
Additions tax 1927	214.88				
Totals	229,352.07				229,352.07
Balance Surplus, 12/31/29	926,459.02				926,459.02

Affiliations Schedule

To be filed with each Consolidated Return for the taxable year 1929 and subsequent taxable years. (See Article 12 (c), Regulations 75.)

Taxable year ended December 31, 1929.

Parent corporation: Charles Ilfeld Company.

Address: Las Vegas, New Mexico.

The information required below must be submitted for all corporations in which at least 95 per centum of the stock is owned directly by the parent corporation, and in which an aggregate of at least 95 per centum of the stock is owned [fol. 89] directly by the parent corporation and/or one or more of the other corporations the income of which is included in the Consolidated Returns. See Section 141 of the Revenue Act of 1928, and Regulations 74 and 75.

Name of company, Parent company: 1. Charles Ilfeld Co.; Address, Las Vegas, N. Mex.; Date of Incorporation, 1906; State or Country in Which Incorporated, New Mexico; *Capital Stock Outstanding at Beginning of Year, Par Value, per share, —; total —; Stock Holdings at Beginning of Year, †Number of Shares —, Per Cent —; Owned by — — —.

Name of Company, Affiliated companies: 2. Roy Trading Company; Address, Roy, N. Mex.; Date of Incorporation, 1917; State or Country in Which Incorporated, New Mexico; *Capital Stock Outstanding at Beginning of Year, Par Value, per share, 100; total 50,000; Stock Holdings at Beginning of Year, †Number of Shares, 500; Per Cent, 100; Owned by, Co. No. 1.

Name of Company, Affiliated companies: 3. Springer Trading Co.; Address, Springer, N. Mex.; Date of Incorporation, 1917; State or Country in Which Incorporated, New Mexico; *Capital Stock Outstanding at Beginning of Year, per share, 100; total, 40,000; Stock Holdings at Beginning of Year, †Number of Shares, 400; Per Cent, 100; Owned by, Co. No. 1.

Changes in stock holdings during the year: None.

Remarks: Affiliated Companies Nos. 2 and 3 liquidated and corporations suspended December, 1929.

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*All classes of stock outstanding must be shown except nonvoting stock which is both limited and preferred as to dividends. If any corporation was not in existence at beginning of the year, show stock outstanding at date issued.

†It is not necessary to show stockholders of parent corporation.

We, the undersigned, president and treasurer of the parent corporation, being severally duly sworn, each for himself deposes and says that the above information and statements have been examined by him and are, to the best of his knowledge and belief, true and complete for the taxable year as stated.

Sworn to and subscribed before me this 10th day of March, 1930. (Signature of officer administering oath:) Kathryn M. Wolf, (Title:) Notary Public. My com. expires September 13, 1932. (Notarial Seal: Seal.)

[fol. 90] Max Nordhaus, President. Herman C. Ilfeld, Treasurer. (Corporate Seal: Seal.)

Schedule L—Reconciliation of Net Income and Analysis of Changes in Surplus

Items numbered 1 to 17, blank.

Page 3 of Return

Questions

Kind of Business

1. By means of the key letters given below, identify the corporation's main income-producing activity with one of the general classes, and follow this by a special description of the business sufficient to give the information called for under each general class.

A.—Agriculture and related industries, including fishing, logging, ice harvesting, etc., and also the leasing of such property: State the product or products. B.—Mining and quarrying, including gas and oil wells, and also the leasing of such property. State the product or products. C.—Manufacturing. State the product and also the material if not implied by the name of the product. D.—Construction—excavations, buildings, bridges, railroads, ships, etc., also equipping and installing same with systems, devices, or machinery, without their manufacture. State nature of structures built, materials used, or kind of installations. E1.—Transportation—rail, water, local, etc. State the kind and special product transported, if any. E2.—Public utilities—

gas (natural, coal, or water); electric light or power (hydro or steam generated); heating (steam or hot water); telephone; waterworks or power. E3.—Storage—without trading or profit from sales—(elevators, warehouses, stockyards, etc.). State product stored. E4.—Leasing transportation or utilities. State kind of property. F.—Trading in goods bought and not produced by the trading concern. State manner of trade, whether wholesale, retail, or commission, and product handled. Sales with storage with profit primarily from sales. G.—Service—domestic, including hotels, restaurants, etc.; amusements; other professional, personal, or technical service. State the service. H.—Finance, including banking, real estate, insurance. I.—Concerns not falling in above classes (a) because of combining several of them with no predominant business, or (b) for other reasons.

[fol. 91] 2. Concerns whose business involves activity falling in two or more of the above general classes, where the same product is concerned, should report business as identified with but one of the above general classes; for example, concerns in A or B which also transport and market their own product exclusively or mainly, should still be identified with classes A or B; concerns in C (manufacturing) which own or control their source of material supply in A or B and which also transport, sell, or install their own product exclusively or mainly, should be identified with manufacturing; concerns in D may control or own the source of supply of materials used exclusively or mainly in their constructive work; concerns in E1 or E2 may own or control the source of their material or power; concerns in F may transport or store their own merchandise, but its production would identify them with A, B, or C.

3. Answers:

(a) General class (use key letter designation), F. Wholesale.

(b) Main income-producing business (give specifically the information called for under each key letter, also whether acting as principal, or as agent on commission; state if inactive or in liquidation), Buying and selling merchandise as principal. Wholesale.

Affiliations With Other Corporations

See Instruction 38

4. Is this a consolidated return of two or more corporations? ——. If so, procure from the Collector of Internal Revenue for your district Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return. See Article 12 (c) and (d), Regulations 75.

5. Did the corporation file a consolidated return for the preceding taxable year? Yes.

Predecessor Business

6. Did the corporation file a return under the same name for the preceding taxable year? Yes. Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? No. If answer is "yes" give name and address of each predecessor business, and the date of the change in entity. ——. Upon such [fol. 92] change were any asset values increased or decreased? ——. If the answer is "yes," closing balance sheets of old business and opening balance sheets of new business must be furnished.

Basis of Return

7. Is this return made on the basis of actual receipts and disbursements? No. If not, describe fully what other basis or method was used in computing net income. Accrual.

Valuation of Inventories

8. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state why used and the date inventory was last reconciled with stock. Cost or market whichever lower.

List of Schedules Attached

9. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the corporation should be placed on each separate schedule accompanying the return.

Schedule 10a.—Other Income.
Schedule B.—Sale Capital Assets.
Schedule G.—Bad Debts.
Schedule I.—Depreciation.
Schedule 22c.—Other Deductions.
Operating Statement.
Balance Sheets, 12/31/28 and 12/31/29.
Analysis of Surplus Changes.
Form 851 Affiliations Schedule.
The corporation's books are in care of —— ——, located at Las Vegas, New Mexico.
Page 4 of Return.

Schedule A—Cost of Manufacturing or Producing Goods (See Instruction 2)

None.

Schedule B—Profit from Sale of Real Estate, Stocks, Bonds, etc. (See Instruction 8)

Schedule attached.

[fol. 93] Schedule C—Compensation of Officers (See Instruction 12)

1. Name of officer	2. Official title	3. Time devoted to business	Shares of stock owned 4. Common	5. Preferred	6. Amount of compensation (Enter as Item 12)
Max Nordhaus	President	All	1825.8	85	$7,500
Arthur C. Ilfeld	Vice-Pres.	All	1561.6	85	7,500
Herman C. Ilfeld	Treasurer	All	830.8	85	7,500
Louis C. Ilfeld	Director-Attorney		1301.6	85	5,500
A. Stern	Director	All	750		7,500
E. L. Moulton	Director	All	750		7,500
J. P. Keogh	Secretary	All	50		3,600
					46,600

Schedule D—Cost of Repairs (See Instruction 14)

1. Items	2. Amount (Enter as Item 14)
Salaries and wages —.	
Minor repairs not materially affecting life of asset	$4323.24

Schedule E—Taxes Paid (See Instruction 16)

1. Items	2. Amount (Enter as Item 16)
County and State	$36,465.72

Schedule F—Explanation of Losses by Fire, Storm, etc. (See Instruction 17)

None.

Schedule G—Bad Debts (See Instruction 18)

None.

Schedule H—Dividends Deductible (See Instruction 19)

1. Name of corporation	Amount of Dividends 2. Domestic	3. Foreign
Corona Trading Company	$14,500	
Mountainair Trading Co.	15,060	
Leo Agrees, Inc.	8,400	
Gallup Merc. Co.	28,360	
	66,320	

Schedule I—Explanation of Deduction for Depreciation (See Instruction 20)

Schedule attached.

[fol. 94] Affidavit

We, the undersigned, president and treasurer of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return, including the accompanying schedules and statements, has been examined by him and is, to the best of his knowledge and belief, a true and complete return made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1928 and the Regulations issued thereunder.

Sworn to and subscribed before me this 10th day of March, 1930. (Signature of officer administering oath:) Kathryn M. Wolf, (Title:) Notary Public. My com. expires 9/13/32. (Notarial Seal: Seal.) Max Nordhaus, President. Herman C. Ilfield, Treasurer. (Corporate Seal: Seal.)

Attach a separate sheet if any of the above schedules do not provide sufficient space.

DEFENDANT'S EXHIBIT No. 2

Execute separate form for each tax period.

Treasury Department, Internal Revenue Service. Form 843—Jan. 1922. Comptroller General U. S. January 18, 1922

Important—File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Claim for ( ) Abatement of Tax Assessed; ( ) Credit against Outstanding Assessments; (X) Refund of Taxes Illegally Collected; ( ) Refund of Amounts Paid for Stamps Used in Error or Excess.

Notice to Collector—Collector must indicate in block above the kind of claim, except in Income Tax cases.

Collector's Notation—Collector Internal Revenue, Received May 22, 1931, District New Mexico.

Received June 1, 1931, Claims Control Section.

State of New Mexico, County of San Miguel, ss.

2186052.

Type or Print.

(Name of taxpayer or purchaser of stamps:) Charles Ilfeld Company and Affiliated Companies.

[fol. 95] (Residence—give street and number as well as city or town and state:) ——.

(Business address:) Las Vegas, New Mexico.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged: Wholesale merchants. (Period, Year) From: January 1, 1929, To: December 31, 1929.

2. Character of assessment or tax: Income tax (State for or upon what the tax was assessed or the stamps affixed).

3. Amount of assessment or stamps purchased: $20,836.20.

4. Reduction of Tax Liability Requested (Income and Profits Tax): $14,460.43.

5. Amount to be abated: $—.

6. Amount to be refunded (or such amount as is legally refundable): $14,460.43.

7. Dates of payment (See Collector's receipts of indorsements of canceled checks): Installments year 1930. (If

statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed: Albuquerque, New Mexico.

9. District in which unpaid assessment appears: None.

10. Amount of overpayment claimed as credit: None.

11. Unpaid assessment against which credit is asked: period from — to — $ None.

Deponent verily believes that this application should be allowed for the following reasons: This refund is predicated on amended return, attached hereto and made a part of this claim.

Statement of facts upon which claim is being made is as follows: (see sheets attached). (Attached additional sheets if necessary.)

Sworn to and subscribed before me this 21st day of May, 1931. Kathryn M. Wolf, (Title:) Notary Public. My Com. expires Sept. 13, 1932. (Seal.) (Signed) Herman C. Ilfeld, Treasurer. Charles Ilfeld Company.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

[fol. 96] Certificates

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

SCHEDULE No. —

Name of taxpayer	Character of assessment and period covered	Year	Month	Page	Line	Assessed amount	Date paid	Amount paid
	1929	1930	Mch.	43002	...	$20,836.20		
Charles Ilfeld Company, 1929 income Las Vegas, N. Mex.							3/15/30	5,209.05
							6/16/30	5,209.05
							9/16/30	5,209.05
							12/15/30	5,209.05
Total						$20,836.20		$20,836.20

B. C. Hernandez, Collector of Internal Revenue.
——— ———, Assessment Clerk, Commissioner's Office.

Claim No. —.

I certify that the record of my office show the following facts as to the purchase of stamps:

To whom sold or issued	Kind	Number	Denomination	Date of sale or issue	Amount	If special tax stamp, state: Serial number	If special tax stamp, state: Period commencing

Collector: ——. District: ——. Claim No.: —. District: ——.

Schedule Number —. Allowed or Rejected Number —.

(Nature of tax:) ——.

Claimant: ——. Address: ——.

Examined and submitted for action —— 19—.

——, ——, Committee on Claims.

Claim examined by ——.

Claim approved by ——, Chief of Division.

[fol. 97] Amount claimed: $—.

Amount allowed: $—.

Amount rejected: $—.

Schedule No. —.

Government Printing Office, c2—11704

(1) The Charles Ilfeld Company (the common parent corporation) owning more than 95 per centum of the stock of the Springer Trading Company and Roy Trading Company filed a consolidated return for the year 1929.

(2) During the year 1929 the Springer Trading Company and Roy Trading Company were completely liquidated. All assets belonging to these subsidiaries were sold to outside interests and the proceeds from the sale of these assets applied against the investment as carried by the parent corporation. Statements showing results of liquidations are attached to and made a part of amended return and the losses thus sustained shown on Lines 22-D and 22-F.

(3) The subsidiary companies suffered losses during the years prior to 1929 which were taken in consolidated returns but the losses sustained prior to 1929 have no effect upon the basis—Rec. 75, Art. 34 (c) (2) which reads as follows:

"From the sum of the aggregate bases, as determined in paragraph (1) above, there shall be deducted the aggregate of the losses of such issuing corporation sustained during each of the consolidated return periods (including only the taxable year 1929 and subsequent taxable years) after such corporation became a member of the group and prior to the sale of the stock, to the extent that such losses could not have been availed of by such corporation as a net loss in computing its tax for such periods if it had made a separate return for each of such periods."

(4) The above quoted regulations are invoked in this claim, and the following court decisions and General Counsel's memorandum 7765 amended are cited in support of the demand being made by this company for a refund of taxes with interest illegally collected:

U. S. District Court, Southern District of New York in United Publishers Corporation v. Anderson, 42 Fed. (2) 781, 8 Am. Fed. Tax Rep. 11229. Held. The loss was determined to be the difference between the cost of the stock and the selling price and the court was of the opinion that no [fol. 98] adjustment thereof was necessary on account of the fact that operating losses of the subsidiary had been deducted on consolidated returns filed for prior years.

Remington Rand, Inc., v. Commissioner, 33 Fed. (2d) 77, 7 Am. Fed. Tax Rep. 8785, Ct. D. 149, C. B. June 1930, p. 268.

General Counsel's Memorandum 7765 amended to read as follows:

"It is therefore the opinion of this office that upon the sale of a subsidiary corporation's stock to outside interests no adjustment to the gain or loss basis of such stock in the hands of the parent corporation is permissible on account of the prior gains of the subsidiary, whether such gains are reported in a consolidated return or in a separate return, or on account of the prior losses of the subsidiary whether such losses are reported in a consolidated return or in a separate return

——— ———, Collector Internal Revenue.

Received May 22, 1931. District New Mexico.

Amended Corporation Income Tax Return for Calendar Year 1929

File This Return with the Collector of Internal Revenue for Your District on or Before March 15, 1930.

Form 1120. Treasury Department, Internal Revenue Service.

(Auditor's Stamp:) Overassessment. Tax $—. Interest: —. Penalty: —. Claim No. —. Date of ar. —. Adjusted by ——. Div. —. Sec. —. Unit —. Date ——. Recd. CC by ——. Date ——. See Original.

Print plainly corporation's name and business address. (Name:) Charles Ilfeld Company. (Street and number:) ——. (Post office and State:) Las Vegas, New Mexico.

Date of Incorporation, 1906.

Under the Laws of what State or Country, New Mexico.

Page 1 of Return.

File Code, 92.

(Cashier's Stamp:) Collector Internal Revenue. Re- [fol. 99] ceived May 22, 1931. District New Mexico. Cash, Check, M. O. Cert. of Ind.

First Payment $—.

Carded as ——.

Kind of Business, Wholesale Merchants. Is This a Consolidated Return of Two or More Corporations? ——.

Gross Income

Item and instruction No.			
1. Gross Sales from Trading or Manufacturing, Less Returns and Allowances			$4,245,855.94
2. Less Cost of Goods Sold:			
(a) Inventory at beginning of year	$900,746.06		
(b) Merchandise bought for sale	3,504,049.30		
(c) Cost of manufacturing or producing goods (From Schedule A)			
(d) Total of lines (a), (b), and (c)	$4,404,795.36		
(e) Less inventory at end of year	735,069.03	3,669,726.33	
3. Gross Profit from Trading or Manufacturing (Item 1 minus Item 2)			$576,129.61
4. Gross Profit from Operations Other Than Trading or Manufacturing. (State Source of income):			
(a)			
(b)			
(c)			
5. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds			68,618.40
6. Rents			1,758.45
7. Royalties			

Item and Instruction No.		
8. Profit from sale of Real Estate, Stocks, Bonds, and other Capital Assets (From Schedule B)	(240.00)	
9. Dividends on Stock of Domestic Corporations	66,320.00	
10. Other Income (including dividends received on stock of foreign corporations). (State nature of income):	65,869.61	
(a)		
(b)		
(c)		
11. Total Income in Items 3 to 10		$778,456.07
[fol. 100] Deductions		
12. Compensation of Officers (From Schedule C)	$46,600.00	
13. Rent on Business Property	11,306.53	
14. Repairs (From Schedule D)	2,593.74	
15. Interest	35,190.14	
16. Taxes (From Schedule E)	35,760.30	
17. Losses (From Schedule F)		
18. Bad Debts (From Schedule G) See Schedule "G"	42,445.29	
19. Dividends (From Schedule H)	66,320.00	
20. Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (From Schedule I)	15,659.89	
21. Depletion of Mines, Oil and Gas Wells, Timber, etc. (Submit schedule, see Instruction 21)		
22. Other Deductions Not Reported Above. (Explain below, or on separate sheet):		
(a) Salaries and wages. (Not included in Item 2, 12, or 14 above)		
(b) Net Loss for prior year. (Submit schedule)		
(c) Ordinary and necessary expenses	333,826.52	
(d) Loss—Springer Trading Company—Liquidation	86,116.05	
(e) Loss—Roy Trading Company—Liquidation	44,676.06	
(f)		
23. Total Deductions in Items 12 to 22		$720,494.52
24. Net Income (Item 11 minus Item 23)		$57,961.55
Computation of Tax		
25. Net Income (Item 24 above)		$57,961.55
26. Less Credit of $3,000 (for a domestic corporation having a net income of less than $25,360)		
27. Balance (Item 25 minus Item 26)		$57,961.55
28. Income Tax (12% of Item 27)		6,375.77
29. If net income of domestic corporations is less than $25,360, enter the amount over $25,000		
30. Total Tax (Item 28 plus Item 29) Amended tax paid originally		6,375.77
31. Less: Income Tax Paid at Source. (This credit can only be allowed to a nonresident foreign corporation)		20,836.20
32. Income Tax Paid to a Foreign Country or U. S. possession by a domestic corporation (see Inst. 27)		
33. Balance of Tax (Item 30 minus Items 31 and 32) Over Assessment		14,460.43

An amended return must be marked "Amended" at top of return. Checks and drafts will be accepted only if payable at par.

[fol. 101]

SCHEDULE K-1

Consolidated Balance Sheet

December 31, 1928

Charles Ilfeld Co. and Affiliated Companies, Las Vegas, New Mexico

Assets	Per books	Debit	Credit	Amended	Roy Trading Company	Springer Trading Company	Eliminations	Consolidated
Cash	321,334.09			321,334.09				321,334.09
Notes receivable	107,439.05	(a)78,812.49		186,251.54	895.92		78,812.49	108,334.97
Accounts receivable	567,528.83			567,528.83	329.83			567,858.66
Inventory—Mdse.	900,767.94			900,767.94	1,030.00			901,797.94
Inventory—Hides, wool and pelts	17,075.50			17,075.50				17,075.50
Special fund	2,850.00			2,850.00				2,850.00
Stocks—other companies	416,601.13			416,601.13				416,601.13
Stocks—Springer Company	1,950.39	(b)39,478.61	(c) 1,429.00	40,000.00			40,000.00	
Stocks—Roy Trading Company	41,291.10	(b) 8,708.90		50,000.00			50,000.00	
Bonds	1,250.00	(d) 340.00		1,590.00				1,590.00
Accounts receivable—Subsidiary companies	614,646.71			614,646.71				614,646.71
Notes receivable—stockholders	94,783.74			94,783.74				94,783.74
Land and real estate	16,052.68			16,052.68	1,904.40	600.00		18,557.08
Improvements	142,176.92		(e) 158.75	142,018.17	15,301.24	44,659.85		201,979.26
Furniture and fixtures	41,297.78		(f) 12,168.61	29,129.17		4,109.97		33,239.14
Autos	13,138.59		(g) 1,138.45	12,000.14				12,000.14
Prepaid expenses	4,362.31			4,362.31				4,362.31
Charles Ilfeld Company					6,131.82	508.96		6,640.78
Heating plant						247.89		247.89
Sidewalks						212.52		212.52
Totals	3,304,546.76			3,416,991.95	25,593.21	50,339.19	168,812.49	3,324,111.86

Consolidated Balance Sheet
December 31, 1928
Charles Ilfeld Co. and Affiliated Companies, Las Vegas, New Mexico

Liabilities	Per books	Debit	Credit	Amended	Roy Trading Company	Springer Trading Company	Elimi-nations	Con-solidated
Deposits	52,195.07			52,195.07				52,195.07
Accounts payable	92,688.84			92,688.84				92,688.84
Accrued expenses	21,988.72			21,988.72				21,988.72
Due to subsidiaries	232,964.45			232,964.45				232,964.45
Charles Ilfeld Joint Account	429,400.82			429,400.82				429,400.82
Deferred profits	792.05			792.05				792.05
Reserve for depreciation	137,640.83	(h)11,831.90		125,808.93	7,959.13	28,261.22		162,029.28
Capital stock—preferred	340,000.00			340,000.00				340,000.00
Capital stock—common	1,142,240.00			1,142,240.00	50,000.00	40,000.00	90,000.00	1,142,240.00
Surplus	854,635.98	(i)14,894.81	(i)139,171.90	978,913.07	(42,148.14)	(86,952.30)		849,812.63
Notes payable—Chas. Ilfeld Co.			T		9,782.22	69,030.27	78,812.49	
Totals	3,304,546.76	154,066.71	154,066.71	3,416,991.95	25,593.21	50,339.19	168,812.49	3,324,111.86

(a) Notes of subsidiary companies restored, charged off but disallowed as a deduction in prior years.
(b) Restoring shrinkage in stock of subsidiary companies disallowed in 1924.
(c) Eliminating appreciation stock of subsidiary company.
(d) Restoring War Mothers memorial bonds previously disallowed.
(e) Adjustment of Depreciation Reserve.
(f) Restoring Capital Assets to cost.
(g) Adjustment for exhaustion.
(h) Correcting Reserve for Depreciation.
(i) Adjustment to surplus.

NOTE: These adjustments are taken from Revenue Agent's report dated October 31, 1930, for the year 1928.

[fol. 102] SCHEDULE K-2

Balance Sheet

December 31, 1929

Assets

Current:	
Cash	374,783.59
Notes receivable	95,222.55
Accounts receivable	541,300.01
Merchandise inventory	735,069.03
Special funds	2,575.00
Miscellaneous inventories	3,306.09
Total current	1,752,256.27
Permanent assets	212,404.74
Due from subsidiaries	420,296.14
Notes receivable, stockholders	209,319.08
Bonds	1,250.00
Stock in subsidiaries	429,163.93
Other sundry assets	11,908.07
Total Assets	3,036,598.23

Liabilities

Current:	
Notes payable	69,042.76
Accounts payable	92,422.22
Accrued expense	22,290.23
Personal and sundry accounts payable	8,931.46
Accrued interest	694.64
Total current liabilities	193,381.31
Charles Ilfeld pension fund	6,228.18
Due Charles Ilfeld Joint Ownership	211,520.88
Depreciation	136,308.84
Capital stock: Common "A"	1,185,600.00
Common "B"	37,100.00
Preferred	340,000.00
Surplus	926,459.02
Total Liabilities	3,036,598.23

[fol. 103] Loss from Sale of Capital Assets, Year Ended December 31, 1929

Assets	Cost	Depreciation taken	Amount received	(Loss) gain
Dodge Car	800.00	460.00	200.00	(140.00)
Motor	350.00	165.00	100.00	(85.00)
Burroughs machine	75.00	35.00	25.00	(15.00)
Totals	1,225.00	660.00	325.00	(240.00)

SCHEDULE G

Bad Debts

Las Vegas Books:	
Watrous Mercantile	58.04
Atanecio Sena	559.58
A. Herrera	108.00
B. F. Romero	3.25
Las Vegas Poultry Association	42.49
G. Garcia	5.78
Jno. Leonard	45.00
Annie Lee	2.35
Grease Spot	89.92
B. Piacenza	16.08
G. C. Pagan	150.00
J. B. Fernandez	61.93
Atchison-McCue	168.22
W. H. Ball	19.74
M. Biehl	91.46
Ralph Ciddio	11.65
County of San Miguel	250.00
Ike Davis	321.75
Mrs. A. Delgado	192.67
A. R. Gutierrez	624.44
T. M. DeHerrera	103.28
Chester Hunker	47.90
L. V. Hardware & Furniture Co.	1.61
Lobby Pool Hall	5.64
Manuel E. Martinez	48.52
Luis Montano	358.00
Pastime Pool Hall	111.45
Elmer Pettine	37.72
Mike Pettine	280.88

Felipe Quintana	611.21
[fol. 104] Chamber of Commerce	100.00
Sec. Romero	305.13
Mrs. H. Voght	62.32
C. W. Wildenstein	192.61
Chocolate Shop	406.05
W. G. Ogle	14.90
S. E. Allison	541.36
A. Baer & Company	200.00
Coury Mercantile Co.	28.47
M. Donrance	77.33
R. Garcia y Sanchez	242.53
Gonzales and Son	144.64
F. Griego	59.22
E. C. Holderman	6.51
J. B. Jones	45.08
Justiano Leyba	16.93
Alex Ledouz	32.49
A. Lobato	385.74
Emma Longnecker	600.00
Jose Martinez	52.06
James Martin	150.00
Ed Montoya	188.50
Candido Ortega	32.60
F. Padilla	1,000.00
Ribera Mercantile Co.	30.74
C. J. Romero y Lopez	255.83
Victor Sena	3.59
W. P. Blake	358.51
Blue Parrot	365.73
F. L. Darlington	10.92
A. J. Heitzman	237.03
Lail Supply Company	10.66
Nick Luciana	200.92
Abe Mickenay	150.00
F. C. Olmstead	604.08
B. F. Robinson	134.30
J. M. Starkey	5.00
Stern & Nahm	851.96
J. M. Simmons	3,000.00
Rev. E. Scull	356.54
Miners Trading Company	325.00
J. H. Reynolds	1,400.00
[fol. 105] F. Angel	325.63

Dan Booth	33.18
Jos. Danziger	1,250.00
L. L. Leal	19.07
R. D. Irwin	127.15
N. Luciana	93.56
J. O. Maddux	43.55
Lydia Meffort	150.00
Joe Mitchell	439.76
Pack Mercantile Co.	200.00
Vic Padilla	8.82
R. O. Pittman	69.78
Bad check	1.00
Miners Trading Company	250.00
L. Garcia	1,307.95
Luciana R. Baca	25.77
Bridge Street market	44.50
C. Collins	100.00
Fire Fighters	171.80
Total	22,475.36

Albuquerque Books:

Central Merc. Co.	20.80
Baca Brothers	10.00
San Jose Market	10.00
Breen Service	3.88
John Seth	7.50
Mrs. A. J. Salas	10.83
Regensberger Tire Co.	23.86
Sargent & Martin	14.67
Bond and Nohl	9.60
W. H. Olum	10.00
H. L. Craig	4.49
Gus Mitchell	2.25
Albuquerque Used Car	17.25
T. V. Allen	134.03
Central Grocery	927.57
Crescent Dairy	15.43
Do Nut Shop	139.30
Gaspar Garcia	39.73
Hotel Monksbridge	18.47
[fol. 106] E. F. Hulick	29.43

Ralph Houston	10.00
Wm. Kenworthy	69.61
Richard Lewis	480.68
McSpadden Grocery	2,173.51
National Guard	36.03
L. Olivia	9.83
Panhandle Roofing Company	12.00
Mrs. A. J. Salas	14.58
T. Errerez Mortuary	2.90
J. E. Withers, Jr.	73.08
Walker Allen	300.00
J. Herrera	465.55
Geo. Abousleman	194.81
A. & P. Garage	62.73
Frank Baca	483.10
Jake Barboa	158.06
Brooklyn Cottage	1.22
Catron County	292.40
Central Mercantile Co.	124.63
Co-operative Store	91.50
A. Eichwald Estate	763.10
R. L. Ferguson	5.57
A. Galleeos	87.83
Grants Merc. Company	1,552.20
Tom Greer	56.30
E. E. Hamm	283.72
T. W. Herron	33.70
T. E. Holman	98.84
Hot Springs Laundry	97.96
King, Nilson Company	52.72
Fred Landwehr	243.56
O. L. Luna	45.70
Magdalena Market	312.91
Mehrens Chevrolet Co.	47.34
John Nigro	4.50
No Name Grocery	63.78
Mrs. M. Roberts	77.11
San Marcial Merc.	929.65
San Ysidro Trading Co.	1,354.61
H. Smith	20.50
Ira Sweazea	1,225.27
[fol. 107] E. W. Thomas	4.13
Gary Oil Company	345.79
San Marcial Drug	30.13

Lujan & Chavez	55.21
B. M. Meyer	2,000.00
W. M. Smith	100.00
Meliton Torres	500.00
Andres C. DeBaca	43.53
Fred Balling	1,486.73
Martinez Bros.	52.95
Albert Livermore	103.33
McHorse & Rooney	71.42
N. F. Martinze	384.81
Elisio Ortega	13.60
J. D. Rael	34.95
Ben Seiler	684.60
L. G. White	196.57
Total	19,969.93

Summary:

Total Las Vegas Books	22,475.36
Total Albuquerque Books	19,969.93
	42,445.29

[fol. 108] Depreciation Statement

December 31, 1929

Assets:	Cost	1929 Depreciation	Prior
Santa Rosa Building	17,162.36	858.12	11,988.93
Raton Building	11,000.00	550.00	
Salome Building	5,484.83	266.30	1,953.50
Salome Land	500.00		
Wilson House	4,144.59	242.23	
Wilson House Land	700.00		
Anton Chico House	1,000.00	50.00	200.00
Anton Chico Land	144.75		
N. P. Brown House	2,314.68	72.58	965.70
N. P. Brown Land	800.00		
Real Estate	10,607.93		
F. Lucero Property	4,000.00		
Las Vegas Equipment	6,562.54	1,438.03	2,314.00
Raton Equipment	2,314.13	297.39	448.79
Las Vegas Equipment	3,069.65	153.49	1,353.39
Autos—Las Vegas	1,962.50	392.50	622.50
Autos—Santa Rosa	897.31	179.46	
Autos—Raton	1,105.00	221.00	442.00
Albuquerque Bldg	92,415.74	6,279.85	79,811.04
Magdalena Building	21,078.16	1,186.71	11,584.35
Albuquerque Furn. & Equipment	7,560.59	1,066.66	2,424.19
Santa Fe Furniture & Fixtures	10,123.70	1,012.37	4,034.36
Santa Fe Oil Equipment	271.29	67.82	135.64
Santa Fe Autos	1,596.58	364.32	573.30
Albuquerque Autos	4,308.29	953.16	952.77
Magdalena Furn. & Fixt	1,280.12	7.90	844.49
Totals	212,404.74	15,659.89	120,648.95

[fol. 109] SCHEDULE I

Line 22-C

Ordinary and Necessary Expenses, Year Ended December 31, 1929

Hardware catalogue	2,837.76
Discounts allowed	31,730.64
Attorney's fees	288.73
Collection expenses	640.96
Miscellaneous	159.02
Grossaint Aldredge Bean	169.28
Ernst & Ernst Audit	2,640.71
Insurance, Schronmaker, Springer	207.37
Advertising	2,615.65
Auto expense	3,104.03
Flood protection	300.00
Dues	1,990.96
General expenses (audit and traffic)	4,919.85
Insurance, fire	9,101.34
Group insurance	1,527.68
Light, heat and water	2,970.57
Postage	4,821.08
Salaries	209,212.30
Stationery	3,657.63
Telephone and telegraph	4,561.37
Auditors' traveling	597.60
Traveling	17,498.49
Sundries	10,044.84
Collection charges, Albuquerque	215.35
Commissions paid, Dry Goods selling	10,301.46
Commissions paid, Grocery selling	4,792.50
Commissions paid, Hardware selling	1,994.15
Office supplies	627.72
Store supplies	865.05
Drayage	1,106.37
	335,400.46

[fol. 110]

Less: previously reported		
Roy Trading Company	978.49	
Springer Trading Company	595.45	
		1,573.94
Net		333,826.52

Line 22-D

Disposition of Springer Trading Company's Stock & Note Period, January 1, 1929, to December 30, 1929

Investment		
Stock—Springer Trading Company	40,000.00	
Note—Springer Trading Company	69,030.27	
Total Investment Springer Trading Co		109,030.27
Receipts From Liquidation		
Cash on hand January 1, 1929	508.96	
Rents received	2,562.50	
Arming and Powell	150.00	
Sale of land, buildings, etc	22,500.00	
Total receipts	25,721.46	

Deduct			
Liquidation Expenses			
Rent	43.50		
Insurance	583.65		
Repairs	1,133.66		
Filing annual report	1.00		
Telegram	.30		
Freight	22.63		
Floersheim	27.89		
New Mexico Power Company	289.77		
L. C. Ilfeld expenses	10.50		
Taxes	694.94		
Total expenses		2,807.24	
Net receipts			22,914.22
Net Loss			86,116.05

[fol. 111] Line 22-E

Disposition of Roy Trading Company's Stock & Note Period, January 1, 1929, to December 30, 1929

Investment			
Stock—Roy Trading Company—at cost		50,000.00	
Note—Roy Trading Company—Cash		9,782.22	
Total investment Roy Trading Co			59,782.22
Receipts from Liquidation			
Cash on hand January 1, 1929		6,131.82	
Collections		836.18	
Rents		318.50	
Sale of real estate and improvements		8,170.09	
Total receipts		15,456.59	
Deduct			
Liquidation Expenses			
Filing annual report	1.00		
Repair heating plant	183.85		
Repair rofing	68.05		
Repair coal bin	4.25		
Insurance	47.80		
Commission—Smith	35.00		
State & County taxes	10.48		
Total expenses		350.43	
Net receipts			15,106.16
Net loss			44,676.06

[fol. 112]

Line 10-A

Other Income

Year Ended December 31, 1929

Revenue		
Tie Trading		108.18
Recoveries of accounts		12,157.34
Miscellaneous		143.77
Fire adjustment		1,964.67
Bean trading		1,375.67
Discount earned		49,864.04
Hides—Pelts		237.47
Group insurance		252.20
Parcel post		346.39
		66,449.73
Less: previously reported		
Springer Trading Company	150.00	
Roy Trading Company	430.12	
		580.12
Total		65,869.61

Page 3 of Return

Schedule L—Reconciliation of Net Income and Analysis of Changes in Surplus

1. Net income from Item 24, page 1 of the return		$ 57,961.55
2. Nontaxable income:		
(a) Interest on obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia		
(b) Interest on securities issued under the Federal Farm Loan Act, or under such Act as amended		
(c) Interest on obligations of the United States or its possessions		
(d) Dividends deductible under Section 23 (p) of the Revenue Act of 1928		
(e) Proceeds of life insurance policies paid upon the death of the insured		
(f) Other items of nontaxable income (to be detailed):		

[fol. 113]

(1) Dividends		66,320.00
(2) Loss—Roy Trading Co.		44,676.06
(3) Loss—Springer Trading Co.		86,116.05
3. Charges against reserve for bad debts, if Item 18, page 1 of return, is not an addition to a reserve		
4. Charges against reserves for contingencies, etc., (to be detailed):		
(a) Roy Trading Company		
(b) previously reported in		
(c) error		2,515.77
5. Total of Lines 1 to 4, inclusive		$ 257,589.43
6. Total from Line 14		8,392.83
7. Net profit for year, as shown by books, before any adjustments are made therein (Line 5 minus Line 6)		$ 249,196.60
8. Surplus and undivided profits as shown by balance sheet at close of preceding taxable year		854,635.98
9. Other credits to surplus (to be detailed):		
(a) Income tax		60.00
(b) Depreciation—adjustment		1,543.73
(c) Premium on stock sold		50,374.78
10. Total of Lines 7 to 9, inclusive		$1,155,811.09

11. Total from Line 17		229,352.07
12. Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11)		$926,459.02
13. Unallowable deductions:		
(a) Donations, gratuities, and contributions	$ 655.95	
(b) Income and profits taxes paid to the United States, and so much of such taxes paid to its possessions or foreign countries as are claimed as a credit in Item 32, page 1 of the return		
(c) Federal taxes paid on tax-free covenent bonds		
(d) Special improvement taxes tending to increase the value of the property assessed		

[fol. 114]

(e) Furniture and fixtures, additions, or betterments treated as expenses on the books		
(f) Replacements and renewals		
(g) Insurance premiums paid on the life of any officer or employee where the corporation is directly or indirectly a beneficiary		
(h) Interest on indebtedness incurred or continued to purchase or carry obligations or securities the interest upon which is wholly exempt from taxation		
(i) Additions to reserve for bad debts which are not included in Item 18, page 1 of return		
(j) Additions to reserves for contingencies, etc. (to be detailed):		
(1) Springer Trading Company		
(2) previously reported in		
(3) error		7,736.88
(k) Other allowable deductions (to be detailed):		
(1)		
(2)		
(3)		
14. Total of Line 13	$	8,392.83
15. Dividends paid during the taxable year (state whether paid in cash, stock of the corporation, or other property):		
(a) Date paid, preferred, Character, Cash	$	20,400.00
(b) Date paid, common, Character, Cash	$	171,336.00
(c) Date paid, Adjustment, Character, revenue agent		3,196.32
(d) Date paid Character		
16. Other debits to surplus (to be detailed):		
(a) Premium stock purchased		5,687.32
(b) Income tax		28,517.55
(c) Additional income tax—1927		214.88
17. Total of Lines 15 and 16		$229,352.07

[fol. 115]

Questions

Kind of Business

1. By means of the key letters given below, identify the corporation's main income-producing activity with one of the general classes, and follow this by a special description of the business sufficient to give the information called for under each general class.

A.—Agriculture and related industries, including fishing, logging, ice harvesting, etc., and also the leasing of such

property. State the product or products. B.—Mining and quarrying, including gas and oil wells, and also the leasing of such property. State the product or products. C.—Manufacturing. State the product and also the material if not implied by the name of the product. D.—Construction—excavations, buildings, bridges, railroads, ships, etc., also equipping and installing same with systems, devices, or machinery, without their manufacture. State nature of structures built, materials used, or kind of installations. E1.—Transportation—rail, water, local, etc. State the kind and special product transported, if any. E2.—Public utilities—gas (natural, coal, or water); electric light or power (hydro or steam generated); heating (steam or hot water); telephone; waterworks or power. E3.—Storage—without trading or profit from sales—(elevators, warehouses, stockyards, etc.). State product stored. E4.—Leasing transportation or utilities. State kind of property. F.—Trading in goods bought and not produced by the trading concern. State manner of trade, whether wholesale, retail, or commission, and product handled. Sales with storage with profit primarily from sales. G.—Service—domestic, including hotels, restaurants, etc.; amusements; other professional, personal, or technical service. State the service. H.—Finance, including banking, real estate, insurance. I.—Concerns not falling in above classes (a) because of combining several of them with no predominant business, or (b) for other reasons.

2. Concerns whose business involves activity falling in two or more of the above general classes, where the same product is concerned, should report business as identified with but one of the above general classes; for example, concerns in A or B which also transport and market their own product exclusively or mainly, should still be identified with classes A or B; concerns in C (manufacturing) which own [fol. 116] or control their source of material supply in A or B and which also transport, sell, or install their own product exclusively or mainly, should be identified with manufacturing; concerns in D may control or own the source of supply of materials used exclusively or mainly in their constructive work; concerns in E1 or E2 may own or control the source of their material or power; concerns in F may transport or store their own merchandise, but its production would identify them with A, B, or C.

3. Answers:

(a) General class (use key letter designation): ——.

(b) Main income-producing business (give specifically the information called for under each key letter, also whether acting as principal, or as agent on commission; state if inactive or in liquidation): ——.

Affiliations With Other Corporations, See Instruction 38

4. Is this a consolidated return of two or more corporations? ——. If so, procure from the Collector of Internal Revenue for your district Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return. See Article 12 (c) and (d), Regulations 75.

5. Did the corporation file a consolidated return for the preceding taxable year? ——.

Predecessor Business

6. Did the corporation file a return under the same name for the preceding taxable year? ——. Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? ——. If answer is "yes" give name and address of each predecessor business, and the date of the change in entity. —— Upon such change were any asset values increased or decreased? ——. If the answer is "yes," closing balance sheets of old business and opening balance sheets of new business must be furnished.

[fol. 117]

Basis of Return

7. Is this return made on the basis of actual receipts and disbursements? ——. If not, describe fully what other basis or method was used in computing net income.

Valuation of Inventories

8. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state why used and the date inventory was last reconciled with stock. ——.

List of Attached Schedules

9. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the corporation should be placed on each separate schedule accompanying the return.

Schedule K-1.—Balance Sheet Dec. 31, 1928.
Schedule K-2.—Balance Sheet Dec. 31, 1929.
Schedule "B".—Sale of Capital Assets.
Schedule "G".—Bad Debts.
Schedule "I".—Depreciation.
Line 22-c.—Expenses.
Line 22-d.—Sale of Springer's stock.
Line 22-e.—Sale of Roy's stock.
Line 10-A.—Other income.
The corporation's books are in care of ——, located at ——.

Page 4 of Return.
Schedules A, B, C, D, E, F, G, H, and I (Blank).

Affidavit

We, the undersigned, vice-president and treasurer of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return, including the accompanying schedules and statements, has been examined by him and is, to the best of his knowledge and belief, a true and complete return made in [fol. 118] good faith, for the taxable year stated, pursuant to the Revenue Act of 1928 and the Regulations issued thereunder.

Sworn to and subscribed before me this 25th day of May, 1931. (Signature of officer administering oath:) Kathryn M. Wolf, (Title:) Notary Public. My com. expires September 13, 1932. (Notarial Seal: Seal.)

Arthur C. Ilfeld, Vice-President. Herman C. Ilfeld, Treasurer. (Corporate Seal: Seal.)

Attach a separate sheet if any of the above schedules do not provide sufficient space.

DEFENDANT'S EXHIBIT No. 3.

Authorization and Consent of Subsidiary Corporation Included in a Consolidated Income Tax Return and Return of Information for Calendar Year 1929

Or Fiscal Year begun —— —, 1928, and ended —— —, 1929.

Or for Period begun —— —, 1928, and ended —— —, 1929.

If return is for calendar year 1929, file it on or before March 15, 1930.

If the return is for a fiscal year, file it on or before the 15th day of the third month following the close of the fiscal year.

(Name of subsidiary:) Roy Trading Company.

(Street and number or rural route:) ——.

(Post Office and State:) Roy, New Mexico.

(Date received:) Collector Internal Revenue, Received March 28, 1930. District: New Mexico.

(1) Date incorporated: 1917. Under laws of what State: New Mexico.

(2) Kind of business: Retail General Merchandise.

(3) Name of parent corporation: Charles Ilfeld Company.

(4) Address of parent corporation: Las Vegas, New Mexico.

(5) Internal Revenue District in which consolidated return is filed (Give district, or city and State): Albuquerque, N. M.

The above-named subsidiary corporation hereby authorizes the above-named parent corporation (or in the event of its failure, the Commissioner or the Collector) to make a consolidated return on its behalf for the taxable year for which this form is filed, and for each taxable year thereafter [fol. 119] after that a consolidated return must be made under the provisions of Article 11 (a) of Regulations 75.

The above-named subsidiary corporation, in consideration of the privilege of joining in the making of a consolidated return with the above-named parent corporation, hereby consents to and agrees to be bound by the provisions of Regulations 75 prescribed prior to the making of this return. This consent is applicable to the taxable year for which this form is filed and to each taxable year thereafter

that a consolidated return must be made under the provisions of Article 11 (a) of Regulations 75.

Affidavit

We, the undersigned, president and treasurer of the above-named subsidiary corporation, being severally duly sworn, each for himself deposes and says that the above-named subsidiary has authorized him to execute this form on its behalf, and that this form, including the accompanying list (if any), has been examined by him and the information contained herein is to the best of his knowledge and belief, a true and complete return of information made in good faith pursuant to the Revenue Act of 1928 and the Regulations issued thereunder.

Sworn to and subscribed before me this 26th day of March, 1930. (Signature of officer administering oath:) Kathryn M. Wolf, (Title:) Notary Public. My Com. expires September 13, 1932. (Notarial Seal: Seal.)

Louis C. Ilfeld, President. Arthur C. Ilfeld, Treasurer. (Corporate Seal: Seal.)

Instructions

Two duplicate originals of this form must be prepared and executed. Each must be executed under the corporate seal, and sworn to by the persons then qualified to swear to a separate return of such corporation. One of the duplicate original forms must be attached to the consolidated return as a partt hereof and filed by the parent corporation. The other must be filed in the office of the Collector for the district in which the subsidiary corporation has its principal place of business or principal office or agency, at or before the time the parent corporation files the consolidated return.

[fol. 120] DEFENDANT'S EXHIBIT No. 4

Authorization and Consent of Subsidiary Corporation Included in a Consolidated Income Tax Return and Return of Information

For Calendar Year 1929

Or Fiscal Year begun —— —, 1928, and ended —— —, 1929.

Or for Period begun —— —, 1928, and ended ——, 1929.

If return is for calendar year 1929, file it on or before March 15, 1930.

If the return is for a fiscal year, file it on or before the 15th day of the third month following the close of the fiscal year.

(Name of subsidiary:) Springer Trading Company.

(Street and number or rural route:) ——.

(Post Office and State:) Springer, New Mexico.

(Date received:) Collector Internal Revenue, Received March 28, 1930. District, New Mexico.

(1) Date incorporated, 1917. Under laws of what State, New Mexico.

(2) Kind of business, Retail General Merchandise.

(3) Name of parent corporation, Charles Ilfeld Company.

(4) Address of parent corporation, Las Vegas, New Mexico.

(5) Internal Revenue District in which consolidated return is filed (Give district, or city and State): Albuquerque, New Mexico.

The above-named subsidiary corporation hereby authorizes the above-named parent corporation (or in the event of its failure, the Commissioner or the Collector) to make a consolidated return on its behalf for the taxable year for which this form is filed, and for each taxable year thereafter that a consolidated return must be made under the provisions of Article 11 (a) of Regulations 75.

The above-named subsidiary corporation, in consideration of the privilege of joining in the making of a consolidated return with the above-named parent corporation, hereby consents to and agrees to be bound by the provisions of Regulations 75 prescribed prior to the making of this return. This consent is applicable to the taxable year for which this form is filed and to each taxable year thereafter [fol. 121] that a consolidated return must be made under the provisions of Article 11 (a) of Regulations 75.

Affidavit

We, the undersigned, president and treasurer of the above-named subsidiary corporation, being severally duly sworn, each for himself deposes and says that the above-

named subsidiary has authorized him to execute this form on its behalf, and that this form, including the accompanying list (if any), has been examined by him and the information contained herein is, to the best of his knowledge and belief, a true and complete return of information made in good faith pursuant to the Revenue Act of 1928 and the Regulations issued thereunder.

Sworn to and subscribed before me this 26th day of March, 1930. (Signature of officer administering oath:) Kathryn M. Wolf. (Title:) Notary Public. My Com. expires September 13, 1932. (Notarial Seal; Seal.)

Arthur C. Ilfeld, President. Herman C. Ilfeld, Treasurer. (Corporate Seal; Seal.)

Instructions.

Two duplicate originals of this form must be prepared and executed. Each must be executed under the corporate seal, and sworn to by the persons then qualified to swear to a separate return of such corporation. One of the duplicate original forms must be attached to the consolidated return as a part thereof and filed by the parent corporation. The other must be filed in the office of the Collector for the district in which the subsidiary corporation has its principal place of business or principal office or agency, at or before the time the parent corporation files the consolidated return.

In United States District Court

Motion to Amend Decree—Filed October 8, 1932

Comes now the defendant by Hugh B. Woodward, United States Attorney, and Dudley Cornell, Assistant United States Attorney, and shows to the court that by decree made in this cause and dated the 19th day of August, 1932, it was decreed that the plaintiff should have and recover from the defendant interest at the rate of six (6) per cent upon the judgment, until paid.

Under the Act of June 30, 1932, Section 319, it is provided that the rate of interest to be allowed or paid shall be four (4) per cent per annum upon any judgment of what-

[fol. 122] soever character against the United States and or upon any overpayment in respect of any internal revenue tax.

Wherefore, defendant moves the court that the said decree may be corrected by providing for interest at the rate of four (4) per cent per annum upon said judgment.

Hugh B. Woodward, United States Attorney, by Dudley Cornell, Assistant U. S. Attorney.

Duly sworn to by Dudley Cornell. Jurat omitted in printing.

In United States District Court

Amended Judgment—Filed October 19, 1932

This cause coming on regularly to be heard before the Court on the 19th day of October, A. D. 1932, upon the motion of defendant to amend the judgment and the defendant being represented by Hugh B. Woodward, United States Attorney, and Dudley Cornell, Assistant United States Attorney, for the District of New Mexico, and plaintiff being represented by its counsel, A. T. Hannett, and the plaintiff not resisting the said motion and the Court being fully advised in the premises,

It is ordered, adjudged and decreed that the judgment of this Court filed herein on the 19th day of August, A. D. 1932, be, and the same is hereby amended in the following respect:

That the provision for interest on said judgment at the rate of six per cent (6%) be, and the same is hereby [fol. 123] amended to read four per cent (4%) in each instance where interest is provided for in said judgment.

At Santa Fe, New Mexico, this 19th day of October, A. D. 1932.

Colin Neblett, United States District Judge.

In United States District Court

Petition for Appeal—Filed November 12, 1932

To the above entitled Court and to the Honorable Colin Neblett, Judge thereof:

Your petitioner, the defendant in the above-entitled case, feeling aggrieved by the judgment as entered herein in

favor of said plaintiff, on August 19, 1932, prays that this appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record of the proceedings, and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Tenth Circuit, under the rules of such Court in such cases made and provided, and in connection with this petition, petitioner hereby presents Assignment of Errors, dated November 9, 1932.

Hugh B. Woodward, United States Attorney; Dudley Cornell, Assistant U. S. Attorney; Alva C. Baird, Special Attorney, Bureau of Internal Revenue; Eugene Harpole, Special Attorney, Bureau of Internal Revenue; Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed November 12, 1932

The defendant and appellant, above-named, makes and files the following Assignment of Errors, upon which he will rely for the prosecution of his appeal from the Judgment of this Court, entered therein on the 19th day of August, 1932:

[fol. 124]

I

The Court erred in rendering judgment against the defendant and in favor of the plaintiff, in the sum of $14,460.43, together with interest thereon, in that

1. The evidence introduced herein is insufficient to support the Findings of Fact made by the Court.

2. The Findings of Fact made herein are insufficient to support the Conclusions of Law made by the Court.

3. The Conclusions of Law made by the Court herein are insufficient to support a judgment in favor of the plaintiff in said amount or in any other sum, or at all.

II

The Court erred in rendering judgment against the defendant in favor of the plaintiff for the reason that the pleadings and the evidence introduced disclosed that the plaintiff, Charles Ilfeld Company, a corporation, was affiliated with the Springer Trading Company, a corporation, at all times from the year 1917 to the 30th day of December,

1929, inclusive; that the plaintiff was affiliated with the Roy Trading Company from the year 1920 to and including the 30th day of December, 1929, inclusive; that on March 18, 1930, the plaintiff, the Springer Trading Company and the Roy Trading Company filed a consolidated income tax return for the calendar year 1929; that plaintiff had for the taxable years 1918 to 1929, inclusive, filed consolidated corporation income tax returns on which it claimed and received an allowance as deductions from its own net income of the following sums as losses sustained by its subsidiaries, the Springer Trading Company and the Roy Trading Company, respectively.

[fol. 125] Losses claimed on prior years consolidated returns:

Year	Trading Co.	Trading Co.
1918	$2,953.20	
1920	34,979.15	
1921	32,559.68	$13,157.09
1922	30,701.20	36,725.55
1923	3,794.38	2,716.22
1924	4,719.71	
1925	11,100.64	5,834.30
1926	3,552.31	
1927	4,491.22	574.09
1928	2,572.83	
1929		2,527.92
Total	$131,424.41	$61,535.17

and on which it reported and was taxed upon the following sums as profits realized by said Springer Trading Company and Roy Trading Company:

Profits reported as a part of the consolidated income were as follows:

Year		
1919	$12,077.63	
1920		$3,007.74
1924		421.33
1926		965.41
1928		12.84
1929	836.24	
Total	$12,913.88	$4,407.32

That on the 22nd day of December, 1929, the Springer Trading Company distributed all of its assets consisting of $22,914.22 in cash to the plaintiff; that on the 23rd day of December, 1929, the Roy Trading Company distributed all of its assets consisting of $15,106.00 in cash to the plaintiff; that on the 30th day of December, 1929, the Springer Trading Company and the Roy Trading Company by vote of their stockholders in meeting assembled, suspended corporate activities and thereafter during the year 1929 cancelled their certificates of stock and surrendered their corporate charters.

[fol. 126] III

The Court erred in adopting its Findings of Fact numbered I, II and III, for the reasons that the pleadings and the evidence introduced herein do not support the said findings as made and entered by the Court herein, but on the contrary establish that affiliation between the plaintiff, Charles Ilfeld Company, the Springer Trading Company and the Roy Trading Company was not terminated during the month of November, 1929, but continued to and including the 30th day of December, 1929, within the meaning of Section 141(d) of the Revenue Act of 1928, 26 USCA 2141.

IV

The Court erred in adopting its Finding of Fact No. IV, made and entered herein, for the reason that the evidence introduced establishes that the Springer Trading Company and the Roy Trading Company were neither liquidated nor dissolved in the month of November, 1929, but on the contrary both continued in existence and undissolved until the 30th of December, 1929.

V

The Court erred in entering and adopting its Finding of Fact No. IX, made and entered herein on the ground that the pleadings and the evidence introduced herein do not support the said finding as made and entered by the Court.

VI

The Court erred in making and entering its Conclusion of Law No. 1, for the reason that the pleadings and the evidence introdu-ed at the trial, and the facts found by

the Court fail to warrant or support said Conclusion, but, on the contrary, disclose that the liquidating dividends paid over to plaintiff by its subsidiary corporations, the Springer Trading Company and the Roy Trading Company, during the month of December, 1929, were paid over in cancellation or redemption of the capital stock of said corporations and constituted inter-company transactions within the meaning and intendment of Section 141 of the Revenue Act of 1926, USCA 2141 and Articles 31 (a) and 37 (a) of Treasury Regulations 75, promulgated under authority conferred by Section 141 (b) of the Revenue Act of 1928, USCA 2141.

[fol. 127] VII

The Court erred in making and entering its Conclusion of Law No. II, for the reason that the pleadings on file, the evidence introduced at the trial of the case, and the Findings of Fact made by the Court fail to warrant or support said Conclusion, but, on the contrary, disclose that the entire calendar year 1929 and not the period of time from January 21, 1929, up to and including the month of November, 1929, constituted a consolidated return period within the meaning of Section 141 of the Revenue Act of 1928, 26 USCA 2141, and Article 2 (e), Treasury Regulations 74; and that the affiliation between the two subsidiary companies and the plaintiff terminated on the 30th day of December, 1929, and not during the month of November, 1929, within the meaning and intendment of Section 141 (d) of the Revenue Act of 1928, 26 USCA 2141. And further, that the payment to plaintiff of the liquidating dividends by its subsidiary companies in the month of December, 1929, was made during a consolidated return period.

VIII

The Court erred in refusing to adopt the Findings of Fact presented by the defendant herein as set forth in the defendant's proposed Findings of Fact and Conclusions of Law filed herein, more specifically by refusing to adopt the following paragraphs of defendant's proposed Findings of Fact and Conclusions of Law herein:

(a) Defendant's proposed Finding of Fact No. I.

(b) Defendant's proposed Finding of Fact No. III.

(c) Defendant's proposed Finding of Fact No. IV.

(d) Defendant's proposed Finding of Fact No. V.

(e) Defendant's proposed Finding of Fact No. VI.

(f) Defendant's proposed Finding of Fact No. VII.

(g) Defendant's proposed Finding of Fact No. XV.

(h) Defendant's proposed Finding of Fact No. XVI.

(i) Defendant's proposed Finding of Fact No. XVII.

(j) Defendant's proposed Finding of Fact No. XVIII.

(k) Defendant's proposed Finding of Fact No. XIX.

[fol. 128] (l) Defendant's proposed Finding of Fact No. XX.

(m) Defendant's proposed Finding of Fact No. XXI.

(n) Defendant's proposed Finding of Fact No. XXII.

on the ground and for the reason that the pleadings on file and the evidence introduced in this cause established the facts so requested by the defendant herein.

IX

The Court erred in refusing to adopt Conclusions of Law Nos. I, II, III, IV, V, VI, VII, VIII, IX, X, XI and XII proposed by the defendant herein on the ground and for the reason that the pleadings filed, the evidence introduced herein and the findings of fact proposed by the defendant herein supported and warranted the Conclusions of Law requested by the defendant herein.

X

The Court erred in denying defendant's motion for the adoption of the Special Findings of Fact and the Conclusions of Law proposed by the defendant herein on the ground and for the reason that said Findings of Fact and Conclusions of Law so proposed by the defendant were supported by the pleadings and the evidence introduced herein.

XI

The Court erred in not granting defendant's motion for judgment made at the conclusion of the trial of the said case for the reason that the evidence introduced was not

sufficient to warrant or support a judgment in favor of the plaintiff.

XII

The Court erred in entering its judgment herein in favor of the plaintiff in that said judgment is not supported by the evidence herein or by the preponderance thereof. It is not supported by the Findings of Fact and the Conclusions [fol. 129] of Law proposed by the defendant herein. That said judgment entered herein is contrary to law.

Dated this 9th day of November, 1932.

Hugh B. Woodward, United States Attorney; Dudley Cornell, Assistant U. S. Attorney; Alva C. Baird, Special Attorney, Bureau of Internal Revenue; Eugene Harpole, Special Attorney, Bureau of Internal Revenue, Attorneys for Defendant.

In United States District Court

Order Allowing Appeal—Filed November 19, 1932

In the above entitled action, the defendant having filed his petition for an order allowing him to appeal from the judgment entered in the above entitled action on August 19, 1932;

It is ordered, that said appeal, from said judgment, to the United States Circuit Court of Appeals for the Tenth Circuit, be and the same is hereby allowed to the defendant, and that a certified transcript of the record, bill of exceptions, exhibits, stipulations and pleadings and all proceedings herein be transmitted to said United States Circuit Court of Appeals.

Dated this 14th day of November, 1932.

Orie L. Phillips, United States Circuit Judge.

In United States District Court

Præcipe for Transcript on Appeal—Filed December 3, 1932

To Wm. D. Bryars, Clerk of the United States District Court for the District of New Mexico:

You are hereby requested to make a Transcript of Record to be filed in the United States Circuit Court of

Appeals for the Tenth Circuit, pursuant to an appeal [fol. 130] allowed in the above-entitled cause, and to include in said Transcript of Record, the following papers:

1. Citation on Appeal.
2. Complaint.
3. Answer.
4. Stipulation Waiving Jury.
5. Defendant's Motion for Judgment.
6. Defendant's Request for Findings of Fact and Conclusions of Law with Proposed Special Findings of Fact and Conclusions of Law attached.
7. Findings of Fact and Conclusions of Law.
8. Judgment.
9. Orders Extending Time for Settling Bill of Exceptions.
10. Bill of Exceptions.
11. Petition for Appeal.
12. Order allowing Appeal.
13. Assignment of Errors on Appeal.
14. Motion for Amending Judgment.
15. Order Amending Judgment.
16. Clerk's Certificate and this Præcipe. Dated this 26th day of November, 1932.

Hugh B. Woodward, United States Attorney, Dudley Cornell, Assistant U. S. Attorney, Alva C. Baird, Special Attorney, Bureau of Internal Revenue; Eugene Harpole, Special Attorney, Bureau of Internal Revenue; Attorneys for Defendant.

[fols. 131 & 132] Acknowledgment of service of the foregoing præcipe made this 1st day of December, 1932.

A. T. Hannett, Attorney for Plaintiff.

(Citation in proper form, directed to appellee, was issued on Nov. 14, 1932, and on Nov. 17, 1932, service of said citation was accepted by counsel for said appellee.)

Clerk's Certificate to foregoing transcript omitted in printing.

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit, viz:

EIGHTH DAY, APRIL TERM, TUESDAY, APRIL 18TH, A. D. 1933

Before Honorable Robert E. Lewis, Circuit Judge, Honorable George T. McDermott, Circuit Judge, and Honorable John C. Pollock, District Judge.

(ORDER OF SUBMISSION)

This cause came on to be heard and was argued by counsel, D. A. Taylor, Esquire, appearing for appellant, and A. T. Hannett, Esquire, appearing for appellee.

Thereupon this cause was submitted to the court.

UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT, APRIL TERM, 1933

No. 787

B. C. HERNANDEZ, Collector of Internal Revenue for the District of New Mexico, Appellant,

v.

CHARLES ILFELD COMPANY, a New Mexico Corporation, Appellee

Appeal from the District Court of the United States for the District of New Mexico

[July 13, 1933]

D. A. Taylor (Hugh B. Woodward, U. S. Atty., Dudley Cornell, Asst. U. S. Atty., and Eugene Harpole, Spec. Atty., Bureau of Internal Revenue, were with him on the brief) for appellant.

A. T. Hannett, for appellee.

Before Lewis and McDermott, Circuit Judges, and Pollock, District Judge

McDERMOTT, Circuit Judge, delivered the opinion of the court.

The plaintiff below, appellee here, recovered a judgment for $14,460.43 on account of an overpayment of income

taxes for the year 1929, a claim for refund thereof having been denied. The question in dispute is whether the taxpayer was entitled to deduct from its income certain losses arising from the liquidation of two of its subsidiaries. The case was tried without a jury, and the facts specially found by the trial court.

The record discloses that in 1917 the plaintiff purchased all of the capital stock of the Springer Trading Company and paid therefor the sum of $40,000.00. The Springer Company was operated as an affiliated and a going concern until November, 1929. During that period the plaintiff advanced to it the sum of $69,030.27. In November, 1929, the Springer Company sold all of its assets to outside interests, paid all of its obligations, and ceased to function as a going concern. On December 23, 1929, the Springer Company turned over to the plaintiff $22,914.22, the net cash proceeds of its liquidation. In the taxable years 1918 to 1929, inclusive, the plaintiff filed consolidated corporation income tax returns in which it claimed and received allowances as deductions from its own net income the aggregate sum of $131,424.41 on account of losses sustained by the Springer Company during ten of those years; in the other two years the plaintiff returned as a part of its consolidated income profits realized by the Springer Company amounting to $12,913.88. The account of the plaintiff with the Springer Company stands as follows:

Purchase price in 1917	$40,000.00
Advances from 1917 to 1929	69,030.27
	$109,030.27
Amount realized on liquidation	22,914.22
Loss claimed to be sustained in 1929	$86,116.05
Losses of Springer Company heretofore claimed and allowed	131,424.41
Profits of Springer Company heretofore returned	12,913.88
Allowed aggregate net deductions from plaintiff's taxable income on account of losses sustained by the Springer Company	$118,510.53

The Roy Trading Company was acquired in 1920 and the facts concerning its operation and liquidation are the same as those of the Springer Company. The figures as to the Roy Company are as follows:

Purchase price in 1920	$50,600.00
Advances from 1920 to 1929	9,782.22
	$59,782.22
Amount realized on liquidation	15,106.16
Loss claimed to be sustained in 1929	$44,676.06
Losses of Roy Company heretofore claimed and allowed	61,535.17
Profits of Roy Company during four of the years during affiliation	4,407.32
Allowed aggregate net deductions from plaintiff's taxable income on account of losses sustained by the Roy Trading Company	$57,127.85

Although the trial court declined to so find, the record discloses that on December 30, 1929, there was a special meeting of the stockholders of the two subsidiaries, at which resolutions were passed to dissolve the corporations. In accordance therewith the charters of the corporations were surrendered on December 30, 1929.

Two legal questions are presented. First, were the losses sustained by reason of the liquidation of the subsidiaries, intercompany transactions during the period of affiliation of which no account should be taken? Or was the affiliation broken by the sale of all of the assets of the subsidiaries to outsiders, and the payment of the proceeds to the parent? The Collector insists that since the test of affiliation is ownership of stock, that the affiliation continues as long as the stock is owned; that the affiliation therefore continued until December 30, 1929; that the losses occurred either in November when the assets of the subsidiary were sold, or on December 23 when the proceeds were paid over to the parent, and that either date is within the period of affiliation; that it was therefore an intercompany transaction, and cannot be reckoned in arriv-

ing at the net corporate income of the consolidated corporations.

We are of the opinion that this is entirely too narrow a view to take of the transactions. It is an attempt to divide the indivisible. The sale of all of their assets by the two subsidiaries, promptly followed by their turning over of the net proceeds of the sales to the plaintiff, and the prompt surrender of their charters, are but steps in a single transaction which terminated the affiliation. A consolidated return by affiliated corporations is a statutory device to arrive at the true income of an economic unit,—an effort to prevent distortion of true income by the elimination of transactions between members of the group which do not affect the income of the group as a whole. But when the subsidiaries sold their assets, they sold them to parties outside of the group; an actual loss to the economic unit resulted. To hold that this actual loss, sustained by the plaintiff, may not be allowed because the formality of surrendering the corporate charters did not take place until a few days thereafter, is to stick in the bark. It has been so many times held that the form must give way to the substance that it has become an axiom. If the form of the transaction should prevail over the substance, on the point here presented, a clear way would be pointed out by which consolidated corporations might avoid the payment of their just taxes. A consolidated group might sell one of its subsidiaries to a stranger for an actual profit of a million dollars in cash, and avoid all taxes thereon by the very simple device of failing to surrender the corporate charter until the next succeeding taxable year. An interpretation which would permit of such a ready avoidance of taxation of a profit actually realized should not be adopted unless the words of the statute are mandatory.

Neither the statutes nor the regulations require any such holding. The whole scheme of consolidated returns deals only with corporations affiliated in fact; in the ordinary case, it would seem that affiliation commences with the acquisition of a corporation from owners outside the group; it ends with a disposal of all its properties or its stock to those outside the group. Section 141 of the Revenue Act of 1928 (26 U. S. C. A. 2141) contemplates the termination of an affiliation during the taxable year. Subsection (a) provides:

"In the case of a corporation which is a member of the affiliated group for a fractional part of the year the consolidated return shall include the income of such corporation for such part of the year as it is a member of the affiliated group."

Notwithstanding that this statute is clear and unambiguous, the appellant maintains that under subdivision (a), Art. 37, Reg. 75, a consolidated return may not reflect the results of the transaction by which the affiliation was broken, nor the gain or loss resulting from a sale by the group to an outsider. That subdivision reads:

"Gain or loss shall not be recognized upon a distribution during a consolidated return period, by a member of an affiliated group to another member of such group, in cancellation or redemption of all or any portion of its stock; and any such distribution shall be considered an intercompany transaction."

This regulation was promulgated in aid of the statutory scheme of consolidated returns of affiliated corporations. If its application is limited to transactions which occurred during the period of affiliation, there is no occasion here to challenge its validity. If one affiliate disposes of a part or all of its assets or its stock to another member of the group, it is probable that this regulation would be applicable. If the regulation attempts to eliminate either gains or losses to the group arising by a sale of its assets to those outside the group, it is in conflict with the statutes and other regulations dealing with consolidated returns, and with the many decisions which have construed those statutes to mean that a consolidated return must reflect the true profits and losses of the affiliates as a unit. Golden Cycle Corporation v. Commissioner (C. C. A. 10) 51 F. (2d) 927, and cases therein cited.

Even upon the theory of the Collector that the subsidiaries continued to exist until December 30, 1929, the affiliation was technically terminated within the taxable year. However, we hold that, on this record, the affiliation was in fact terminated when the subsidiaries sold all of their assets to outsiders and ceased to operate as going concerns.

But the meat of the question is not when the affiliation was broken; the solution of that question is but an aid in arriving at the core of the case, and that is, whether a taxable gain or loss results when a subsidiary sells all its assets to outside interests and goes out of business. Such a transaction does result in gain or loss to the group, and to leave it out of the return will inevitably distort the true income of the group and result in precisely what the statutes undertake to prevent. In Aluminum Goods Mfg. Co. v. Commissioner (C. C. A. 7) 56 F. (2d) 568, the subsidiary sold all of its equipment and good will in 1917, and ceased to transact any business during that period. There was no formal dissolution of the subsidiary until February, 1918, when the charter was surrendered. It was held that the affiliation terminated when the subsidiary disposed of all of its assets in 1917 to those outside the group, and not in 1918, when the charter was surrendered. The loss arising from the sale was allowed as a loss of the parent company in 1917. This decision was affirmed by the Supreme Court of the United States in Burnet v. Aluminum Goods Company, 287 U. S. 544, upon the ground that whether or not the affiliation was terminated by the sale, the gain or loss resulting from the liquidation must be taken into account in arriving at the income of the parent. The case dealt with the excess profits statute, and with other regulations, but the language of the Supreme Court is unmistakable. Among other things, the Court said:

"The purpose of requiring consolidated returns by affiliated corporations was, as the Government contends, to impose the war profits tax, according to true net income and invested capital of what was, in practical effect, a single business enterprise, even though conducted by means of more than one corporation. Primarily, the consolidated return was to preclude reduction of the total tax payable by the business, viewed as a unit, by redistribution of income or capital among the component corporations by means of intercompany transactions."

"These provisions plainly do not lay down any rigid rule of accounting to be applied to consolidated returns which would exclude from the computation of taxable income the results of every intercompany transaction, regardless of its effect upon the capital or the net gains or losses of the business of the affiliated corporations. Instead, they merely

disclose the purpose underlying regulations and statute to prevent, through the exercise of a common power of control, any intercompany manipulation which would distort invested capital or the true income of the unitary business carried on by the affiliated corporations. Hence, no method of accounting, in calculating taxable income upon the consolidated return, can be upheld, which would withhold from the taxpayer all benefit of deduction for losses actually sustained and deductible under the sections governing the computation of taxable income, and which at the same time would not further, in some way, the very purpose for which consolidated returns are required."

"The loss was a real one, suffered by respondent as a separate corporate entity and it was equally a loss suffered by the single business carried on by the two corporations during the period of their affiliation, ultimately reflected in the 1917 loss of capital invested in that business."

We conclude, therefore, that a capital loss resulting from the liquidation of a subsidiary is an item properly entering into the return of the parent.

The second question presented by the record is more difficult. The trial court found that from year to year, the plaintiff, in its consolidated returns, had taken credit for losses of the two subsidiaries against its own income, in an aggregate amount in excess of the losses realized on liquidation. The net loss sustained by the plaintiff on account of the operations of the Springer Company, for which credit is claimed in 1929, is $86,116.05; but during the preceding years plaintiff had claimed and been allowed against its own taxable net income, net losses of $118,510.53. The figures of the Roy Company are $44,676.06 and $57,127.85, respectively. It thus appears that if the plaintiff prevails in this action, it is allowed total credits against its taxable income on account of the Springer Company of $204,626.58, whereas its total investment therein is only $109,030.27. The figures of the Roy Company are, losses claimed $101,803.91, as against a total investment of $59,782.22.

The Collector claims that losses on account of the operation of subsidiaries cannot be taken but once. The plaintiff, without endeavoring to sustain the propriety of a double deduction for losses once sustained, relies upon Remington Rand, Inc. v. Commissioner (C. C. A. 2) 33 F. (2d) 77, certiorari denied, 280 U. S. 591. In that case it appears that

the corporation acquired the stock of the subsidiary for $45,000, and later sold it for $60,000. The court held that the capital gain resulting from this transaction was taxable income. The court declined to offset, as against this realized gain, earnings of the subsidiary which might have been declared as dividends and reinvested in the subsidiary, but which were not, although such earnings were accounted for as a part of the income of the affiliated group. This decision rests upon the accepted doctrine that capital gains are taxable when they are realized; what the court did was to decline to adopt the taxpayer's theory that the accumulation of earnings by a corporation is a constructive receipt of dividends and reinvestment thereof in the corporation. It also accords with the accepted rule that when a stockholder disposes of his stock, he is required to account for the capital gain, and is not allowed a deduction therefrom on account of taxes which have been paid by the corporation upon undistributed earnings. That decision, however, was accepted as controlling by the District Court of New York in United Publishers Corporation v. Anderson, 42 F. (2d) 781, in a case that is not distinguishable from the case at bar. Canal-Commercial Nat. Bank v. Commissioner, 22 B. T. A. 541, is cited by appellee. If that case has any bearing on this one, which we doubt, it supports the contention of the Collector. There a dividend paid by the subsidiary was treated as a part of the proceeds of the liquidation.

The plaintiff argues that, since in arriving at capital gain, operating profits which have been returned for taxes are not taken into the equation, operating losses which have been allowed as deductions should not be considered. There is some logic and convenience in a clear separation of capital losses from operating losses; there is a rough equity in the plaintiff's position that what is sauce for the goose should be treated as sauce for the gander.

On the other hand, there is a natural repugnance to permitting the same loss to be twice deducted from taxable income. The losses heretofore allowed plaintiff, plus the loss now claimed, are nearly twice its entire investment in the subsidiaries—a manifest impossibility. Moreover, plaintiff reasons only by analogy, for the same income may be and often is taxed twice, as every stockholder of a corporation knows. It may not be fair, but it is not impossi-

ble. To say that plaintiff sustained a loss of $306,430.49 on a total investment of $168,812.49 is to say what cannot be. Nor is it clear that the losses taken in preceding years were operating losses, although they probably were.

A corporation which each year deducts the operating losses of its subsidiary from its own income, ought not to be allowed to accumulate those losses and take them again when the subsidiary is finally liquidated. In the instant case, advances made to the subsidiary corporations from year to year were dissipated in the business, and the losses were used to offset the other income of the plaintiff. These advances are now used to augment the cost of the subsidiary, and the losses again utilized to offset other corporate income.

This argument on principle is fortified by the decision of the Supreme Court of the United States in Burnet v. Aluminium Goods Company, 287 U. S. 544. It there appeared that the subsidiary sustained operating losses in 1914, 1915, 1916, and 1917. During the first three years, there was no provision for consolidated returns, and the parent was neither charged with undistributed earnings of the subsidiary, nor credited with its losses. For those years, therefore, it was entirely fair that operating losses or gains should be ignored when the parent disposed of the subsidiary, for its own income tax had not been affected by its subsidiary's losses or its undistributed gains. But in 1917 the law permitted a consolidated return which carried into the parent's return the operating gain or loss of its child. So when the subsidiary was liquidated, the operating loss of 1917 was deducted from the capital loss on liquidation. In that connection the Supreme Court said:

"So far as the loss from operation of the Sales Company in earlier years contributed to respondent's capital loss in 1917, deduction of the latter in the consolidated return involved no double deduction of losses of the business of the two companies during the period of their affiliation. As respondent's total loss in 1917 was reduced, before deduction in the consolidated return, by the amount of the operating loss of the Sales Company for that year, there was no duplication of any losses accrued or sustained in that year. * * * While equitable principles of accounting applied to the calculation of the net income of the business unit do not permit deduction of the loss twice, they do require its deduction once."

A case squarely in point is Burnet v. Riggs National Bank (C. C. A. 4) 57 F. (2d) 980, strongly relied upon by appellee in support of its contentions on the first question presented. In that case it appears that the taxpayer suffered a capital loss in the liquidation of a subsidiary of $94,949.07. Prior to the liquidation, $41,485.22 had been claimed and allowed as an operating loss of the subsidiary against the operating income of the parent corporation. In deciding the contention that the taxpayer was entitled to the entire loss, the court said:

"On the other hand, we are convinced that the Board of Tax Appeals was right in refusing to allow the claim of the Riggs Bank for the entire loss as at the time of the liquidation, because of the fact that a part of this loss had been deducted by the bank in its return for the first part of the year 1922. To allow the entire loss as of June 30, 1922, would have resulted in respondent receiving credit twice for a part of the loss. David M. Goodrich v. Williams H. Edwards, 255 U. S. 527, 41 S. Ct. 390, 65 L. Ed. 758; United States v. Ludey, 274 U. S. 295, 47 S. Ct. 608, 71 L. Ed. 1054. Double credits equally with double taxation are to be avoided where possible in construing laws passed by Congress."

It is our conclusion, therefore, that there should be deducted from the loss on liquidation, net losses which the appellee has been theretofore allowed from its own taxable income on account of the operation of these subsidiaries. The losses already allowed being in excess of the total losses sustained by reason of the purchase, operation and liquidation of these subsidiaries, judgment should go for the defendant.

Reversed.

(JUDGMENT).

FORTY-FIRST DAY, APRIL TERM, THURSDAY, JULY 13TH, A. D. 1933

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

This cause came on to be heard on the transcript of the record from the District Court of the United States for the

District of New Mexico and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed; that this cause be and the same is hereby remanded to the said District Court for a new trial; and that B. C. Hernandez, Collector of Internal Revenue for the District of New Mexico, appellant, have and recover of and from Charles Ilfeld Company, a New Mexico Corporation, appellee, his costs herein and have execution therefor.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 787

B. C. HERNANDEZ, Collector of Internal Revenue for the District of New Mexico, Appellant,

vs.

CHARLES ILFELD COMPANY, a New Mexico Corporation, Appellee

PETITION FOR REHEARING

Now comes the appellee Charles Ilfeld Company by its attorney A. T. Hannett, and respectfully petitions the Court for a re-hearing in the foregoing entitled cause, and as grounds for such Motion, respectfully shows to the Court:

I

That the Court, in its opinion and Judgment handed down and entered in this cause, has overlooked the fact that the consolidated return upon which the appellee claims a refund was made for the year 1929 and that the statute controlling in this cause is Section 2141, Title 26 U. S. C. A., and the rules promulgated thereunder, as therein provided for; and that the decision of this Court is contrary to the express provision of said Statute, and the rules promulgated thereunder, in this:

(a) It was and is contended by the appellant in this cause that subdivision (a) of Article 37 and subdivision

(a) of Article 40 of Regulations 75, promulgated by the United States Treasury Department December 31, 1931, was and is applicable and controlling, which subdivisions read as follows:

"Article 37, Regulations 75—Dissolutions—Recognition of Gain or Loss.

(a) During Consolidation Return Period: Gain or loss shall not be recognized upon a distribution during a consolidated return period by a member of an affiliated group to another member of such group, in cancellation or redemption of all or any portion of its stock; and any such distribution shall be considered an intercompany transaction."

Article 40 (a), Regulations 75, reads:

"(a) Resulting from Transactions during Consolidated Return Period.

Intercompany accounts receivable or other obligations which are the result of intercompany transactions during a consolidated return period shall not be deducted as bad debts during a consolidated return period."

It is contended by the appellee and petitioner herein, that subdivision (b) of Article 37 and subdivision (c) of Article 40, Regulations 75, are controlling. Article 37 (b) of Regulations 75 reads:

"After Consolidated Return Period.

Any such distribution after a consolidated return period, whether in complete or partial liquidation, shall be treated as a sale of stock, and the adjustments specified in Articles 34 and 35 will be made, and Article 36 will be applicable."

Subdivision (c) Article 40 of Regulations 75 reads:

"Limitation on Allowance after Consolidated Return Period.

The rules applicable to the allowance of losses upon the sale of bonds shall be applicable to the allowance after the consolidated return period as a bad debt of an intercompany account receivable or other obligation resulting from

an intercompany transaction during the consolidated return period. (See Article 35.)"

This Court in its decision and opinion ruled in favor of the appellee and held, correctly, that the sale and liquidation in the instant case was not an intercompany transaction. Therefore, subdivision (b) of Article 37 and subdivision (c) of Article 40, Regulations 75, are controlling. Under subdivision (b) and subdivision (c) of Articles 37 and 40, respectively, such distribution after a consolidated return period, whether in complete or partial liquidation shall be treated as a sale of the stock and the adjustment specified in Articles 34 and 35 will be made and Article 36 will be applicable.

II

The decision of this Court is in conflict with the following decisions:

United States Circuit Court of Appeals for the 7th Circuit in the case of Aluminum Goods Manufacturing Company v. Commissioner, 56 Fed. (2d) 568;

United States Circuit Court of Appeals for the 2nd Circuit in the case of Remington Rand, Inc. v. Commissioner, 33 Fed. (2d) 77 (Certiorari denied, 280 U. S. 591);

District of New York in the case of United Publishers Corporation v. Anderson, 42 Fed. (2d) 781;

Supreme Court of the United States in the case of Burnet v. Aluminum Goods Manufacturing Company, 77 L. Ed. 333, 287 U. S. 544;

United States Circuit Court of Appeals for the 4th Circuit in the case of Burnet v. Riggs National Bank, 57 Fed. (2d) 980;

Board of Tax Appeals, in the following cases:
Apartment Corporation v. Commissioner, 26 B. T. A. 849;

Carey Salt Company v. Commissioner, 26 B. T. A. 675;

Liebes H. & Co. v. Commissioner, 23 B. T. A. 787;
Roy & Titcomb, Inc., 24 B. T. A. 969.

Wherefore, appellee prays that a re-hearing be granted in this cause.

Respectfully submitted.

A. T. Hannett, 509-11 Sunshine Bldg., P. O. Box 497, Albuquerque, New Mexico, Attorney for the Appellee.

Supporting Certificate of Counsel

I, the undersigned A. T. Hannett, Attorney for the appellee and petitioner herein, do hereby certify that the foregoing Petition is filed in good faith, that I verily believe that the points and grounds set forth in the foregoing Petition are well taken and that said Petition should be granted.

A. T. Hannett.

Filed Aug. 10, 1933. Albert Trego, Clerk.

United States Circuit Court of Appeals, Tenth Circuit, September Term, 1933

No. 787.

B. C. Hernandez, Collector of Internal Revenue for the District of New Mexico, Appellant,

v.

Charles Ilfeld Company, a New Mexico Corporation, Appellee.

Appeal from the District Court of the United States for the District of New Mexico

[October 10, 1933]

On Petition for Rehearing

Wm. J. Barker, U. S. Atty., E. Barrett Prettyman, Gen. Counsel, Bureau of Int. Rev., D. A. Taylor and Warren W. Cole, Spec. Attys., Bureau of Int. Rev., for appellant.

A. T. Hannett for appellee.

John G. Buchanan, Paul G. Rodewald, David B. Buerger, and Smith, Buchanan, Scott & Gordon filed a brief amici curiæ.

Robert H. Montgomery filed a brief amicus curiæ.

Before Lewis and McDermott, Circuit Judges, and Pollock, District Judge

McDERMOTT, Circuit Judge, delivered the opinion of the court.

In an involved and somewhat confusing petition for rehearing, appellee asserts that it is entitled to a double deduction for the losses of its subsidiaries because of regulations which were not set out in either brief or discussed in written or oral argument, and the court is chided for "ignoring" such regulations. Counsel for other litigants have volunteered to act as friends of the court, all asserting the legal right to deduct losses a second time, and reminding us that if there is a crevice in the dike by which the actual income of affiliated corporations escapes taxation, it is not the function of the judiciary to stop the leak. This widespread and acute interest indicates that the crevice is not of insignificant dimension.

But in all this welter of briefs, no one has suggested any reason why a double credit for the same loss should be allowed, except the inept analogy that an individual stockholder is entitled to his capital loss on sale of his stock without diminution for corporate losses—an analogy which overlooks the controlling circumstance that the individual's personal tax was not reduced through the years by the losses of his corporation. Counsel for appellee and amici curiæ take the bald position that, right or wrong, the Treasury Department has so enacted.

Counsel on both sides agree that the case is ruled by Tr. Reg. 75, issued pursuant to Section 141(B) of the Revenue Act of 1928. We therefore assume, without deciding, that Congress may delegate to the Commissioner the power to legislate and to contract on the troublesome problem of affiliated corporations. An examination of these technical regulations serves to strengthen our conclusion that the Treasury Department intended that losses actually realized from the operation and dissolution of a subsidiary should be de-

ducted once, but not twice, from the income of the parent. Whether, as a matter of accounting, it was intended that such losses or gains should be treated as occurring within or without the consolidated return period is not so clear. The same honest and wholesome result is achieved by either method; the point becomes important only in light of appellee's contention that if the loss is treated as occurring after the consolidated period, it may be taken a second time.

Section 37(a), Tr. Reg. 75, provides that neither gain nor loss shall be recognized upon a distribution in cancellation of stock made during a consolidated return period. Section 37(b) provides that a distribution made after such period shall be treated as a sale of stock and adjustments made as provided in Articles 34, 35, and 36. The controversy presented to the court upon the first hearing centered about the question of which of these sections governed. Arguendo, we said that the affiliation was terminated by a liquidating sale of the assets of a subsidiary to an outsider accompanied, as a part of the same transaction, by a distribution of the proceeds. The decision however was distinctly predicated upon the point that whenever it was considered as occurring, a taxable gain or loss resulted.

Counsel for appellee, upon the assumption that we held that Section 37(b) was applicable, now directs our attention to 34(c)(2) of the Regulations, which provides for a deduction from the aggregate bases of the stock as determined by 34(c)(1) the aggregate of the losses sustained during each of the consolidated return periods "(including only the taxable year 1929 and subsequent taxable years)." The argument is made that the Commissioner thereby is forbidden to take into account losses prior to 1929. That is to say, counsel contend that operating losses prior to 1929 may be twice deducted by a taxpayer exercising the option given by Section 141(a) of the Revenue Act of 1928—an unjust and anomalous result not lightly to be imputed to the Treasury Department, and the mischiefs of which are sufficient "to tip the scales when arguments are nicely balanced," to borrow the forceful language of Justice Cardozo in Woolford Realty Co. v. Rose, 286 U. S. 319.

But even upon appellee's assumption, the flaw in its case is that Section 34(c)(2) does not stand alone; it is a part

of a section providing for an intricate determination and adjustment of the shares of stock of a subsidiary immediately prior to the sale, a determination and adjustment which doubtless was intended to eliminate the apparent anomaly of the parenthetical clause in 34(c)(2). At any rate, if Article 37(b) is applicable the Commissioner must first determine and adjust the bases of the stock immediately prior to the sale. A strong burden was cast upon appellee to prove that the Commissioner erred in determining and adjusting the bases of the stock as required by Section 34. Lucas v. Structural Steel Co., 281 U. S. 264. There is no finding by the trial court as to the adjusted bases of the stock, nor any conclusion that the Commissioner erred in that regard. Without such proof, the Commissioner's determination cannot be set aside.

Counsel for amici curiæ argue that, irrespective of the regulations, earlier operating losses may not be deducted from capital losses sustained on final liquidation. We are cited to cases where courts have properly drawn a distinction between capital losses and operating losses. That there is such a distinction cannot be gainsaid; and it may also be admitted that mental confusion follows in the wake of mingling them. But this confusion is injected into the equation by the statutes which require capital gain to be accounted for as taxable income and permit capital losses to be deducted from operating income. Where operating losses impair the capital of corporations, as here, they are capital losses in the sense that they represent losses of the capital investment. If a corporation's capital was originally $100,000 and it was entirely dissipated in operating losses for which deductions were made through the years, it can hardly be said that the entire loss was a capital loss realized during the year of liquidation. Neither the Supreme Court of the United States nor the Circuit Court of Appeals for the Fourth Circuit was beguiled into a double allowance for the same loss by arguments predicated on nomenclature. Burnet v. Aluminum Goods Company, 287 U. S. 544; Burnet v. Riggs National Bank (C. C. A. 4) 57 F. (2d) 980.

In his brief in opposition to the rehearing, the Collector renews his insistence that Art. 37(a) exempts from taxation any profits, and denies deduction for any losses, that grow out of the liquidation of a subsidiary. The brief

refers us however to an enlightening and authoritative article by the Hon. Andrew W. Mellon, the Secretary of the Treasury who approved Regulation 75, published in the March, 1929, issue of The National Income Tax Magazine (Vol. VII, 3, pp. 105-106). Mr. Mellon classifies dissolutions of subsidiaries into three types, the third type being "where it is decided to abandon the business and close out the affairs of the subsidiary," which is clearly the case here. He then says "any gain should be taxed and any loss allowed as a deduction in the case of a dissolution of the third type." He proceeds:

"Inasmuch as it would be impossible to prescribe a rule which would distinguish the types and which would be susceptible of sound administration, and in view of the fact that the benefit of losses which are properly allowable are not denied if the loss is realized before the dissolution or if the subsidiary is not a member of the group at the time of the dissolution, it was concluded that the rule adopted in the Regulations, treating all dissolutions as intercompany transactions, was the safest and best and would prove the most satisfactory."

From this it appears that the Treasury Department construes the Regulations as permitting a parent to deduct losses realized on the winding up of a subsidiary, no matter whether the loss is treated as realized before or after dissolution. Such interpretation of the Department is in accord with the common sense view taken of the matter by the Supreme Court in Burnet v. Aluminum Goods Company, 287 U. S. 544, and with our first opinion. It is also in accord with the statement of government counsel to the Ninth Circuit Court of Appeals in McLaughlin v. Pacific Lumber Company, — F. (2d) —, that "the present trend of decisions, both in the Board of Tax Appeals and in the courts" is in favor of permitting such deductions.

As so interpreted, Section 37(a) does not refer to the actual gain or loss sustained when the assets of a subsidiary are disposed of, but only to the distribution by which the shares are canceled or redeemed. Of course if the gain or loss on the sale of the assets is accounted for in the consolidated return, it should not again be taken into account when the entry is made offsetting the distribution by a cancellation of the shares. If such is the administra-

sive construction of the Regulation, it does no violence to the settled rule that affiliated corporations must account for gains, and are entitled to deduct losses, that inure to the group. But under such construction, a loss on liquidation of a subsidiary is a proper deduction, as we held.

But all the roads lead to Rome. Whether the loss is treated as occurring during or after a consolidated return period, it is an actual realized loss that should be taken into account; but we are not persuaded by the multitude of counsel that the statute and regulations contemplate it should be taken twice. The petition for rehearing is therefore denied.

TWENTIETH DAY, SEPTEMBER TERM, TUESDAY, OCTOBER 10TH, A. D. 1933

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

(ORDER)

This cause came on to be heard on the petition of appellee for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

MOTION FOR STAY OF MANDATE

Now comes Charles Ilfeld Company, appellee in the above entitled cause, by its attorney A. T. Hannett and respectfully moves the Court for an order staying the issuance of the mandate in the above entitled cause, under and pursuant to Rule 29, Subdivision 3 of this Court, Section 8-D of the Act of February 13th, 1925, of the Congress of the United States, and Subdivision 6 of Rule 35 of the Rules of the Supreme Court of the United States of America; and as grounds for such motion respectfully shows to the Court:

I

That the judgment of the United States District Court for the District of New Mexico was, on the 13th day of

July, 1933, reversed by this Court; and that the petition for rehearing filed thereafter, was on the 10th day of October, 1933, denied by this Court.

II

That the appellee will, with all convenient speed, petition the Supreme Court of the United States of America to issue a writ of certiorari to this Court to review the decision of this Court in this cause.

III

The appellee has this day ordered the clerk of this Court to make up the record of the proceedings had in this Court, pursuant to the rules of the Supreme Court of the United States and the Statutes of the United States in such cases made and provided, and upon receipt thereof, will forthwith attach his petition thereto, to the Supreme Court of the United States praying for a writ of certiorari.

IV

The appellee further shows that unless a stay is granted, it will not in all probability be possible for the appellee to prepare and cause to be filed the record and petition for said writ of certiorari with the clerk of the Supreme Court of the United States before the time said mandate will issue under the law and the rules of this Court.

A. T. Hannett, P. O. Box 497, Albuquerque, New Mexico, Attorney for Appellee.

Filed Oct. 16, 1933. Albert Trego, Clerk.

Twenty-first Day, September Term, Thursday, October 19th, A. D. 1933

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges.

(Order)

This cause came on to be heard on the motion of appellee for a stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under Section 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

(Clerk's Certificate)

United States Circuit Court of Appeals, Tenth Circuit

I, Albert Trego, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of New Mexico, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit, under the supervision of its clerk, and full, true and complete copies of certain pleadings, record entries and proceedings, including the opinions, (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States), had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said Circuit Court of Appeals wherein B. C. Hernandez, Collector of Internal Revenue for the District of New Mexico, was appellant and Charles Ilfeld Company, a New Mexico corporation, was appellee, No. 787, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at office in the City of Denver, Colorado, this 24th day of October, A. D. 1933.

Albert Trego, Clerk of the United States Circuit Court of Appeals, Tenth Circuit. (Seal United States Circuit Court of Appeals, Tenth Circuit.)

[fol. 161] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 18, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,182. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 579. Charles Elfeld Company, Petitioner, vs. B. C. Hernandez, Collector of Internal Revenue for the District of New Mexico. Petition for a writ of certiorari and exhibit thereto. Filed November 10, 1933. File No. 579, O. T., 1933.

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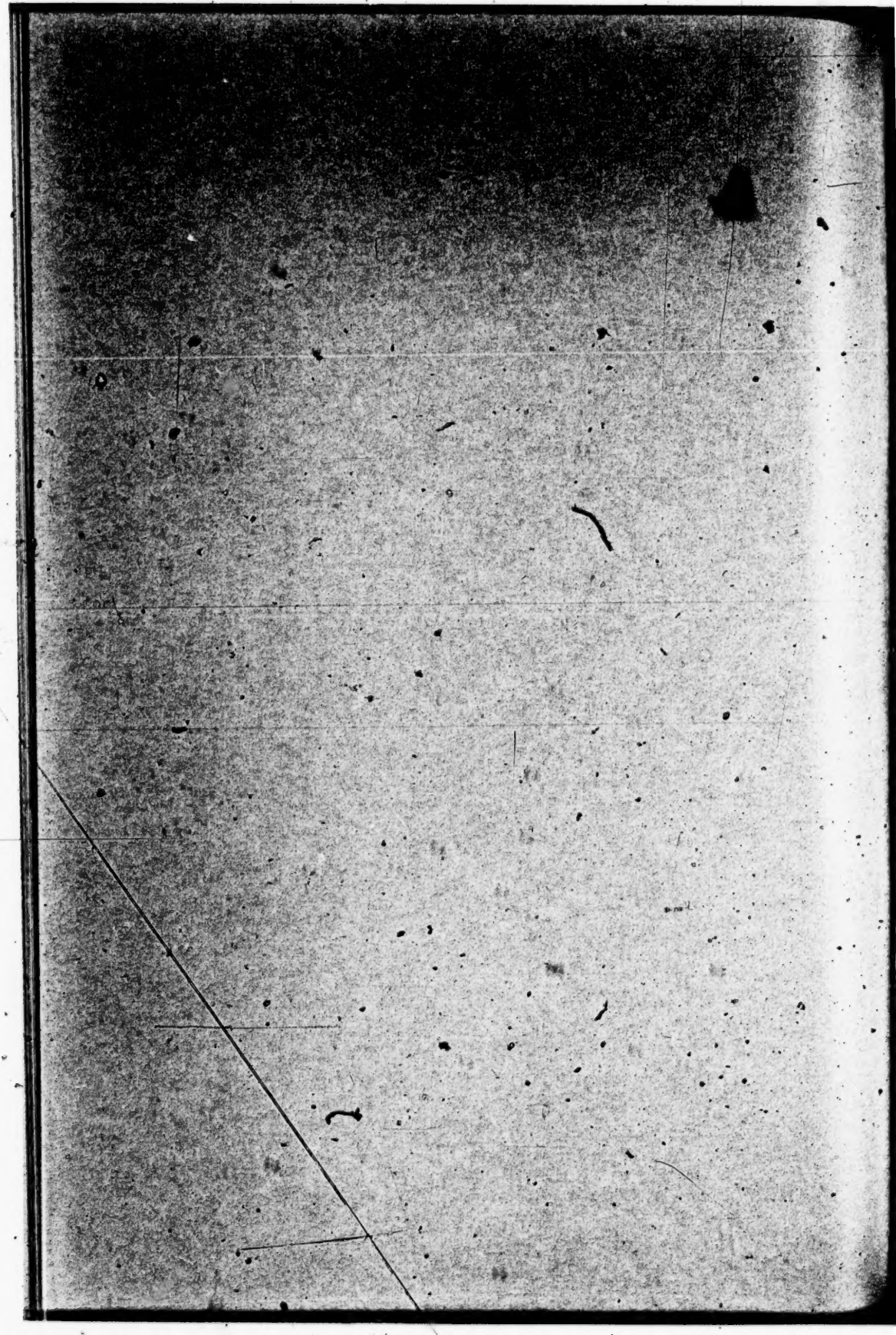

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. .....

CHARLES ILFELD COMPANY, a Corporation,
PETITIONER

vs.

B. C. HERNANDEZ, Collector of Internal Revenue for the District of New Mexico

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT FOR THE TENTH CIRCUIT
and
BRIEF IN SUPPORT THEREOF.

The Charles Ilfeld Company, a corporation, the petitioner herein, respectfully shows to this Honorable Court, as follows:

THE QUESTION PRESENTED

This case arose in the United States District Court for the District of New Mexico, under the Revenue Act of 1928, effective January 1st, 1929, Section 2141 Title 26, U. S. C. A., and the regulations of the Treasury Department, promulgated by the authority of said Act (See Appendix). The petitioning corporation owned all of the stock of two subsidiaries for ten years during which time consolidated returns were filed. The parent corporation, the petitioner herein, operated at a profit during that period, and the two subsidiaries had a total combined loss of $134,792.11 (See Tr. of Rec. pp. 67, 68).

The subsidiaries liquidated in November, 1929, and the parent petitioner charged off its loss on its investment in the

capital stock of the subsidiaries as of December 31, 1929 (Tr. of Rec. p. 23). The petitioner filed a consolidated return for the year 1929, thereby consenting to be bound by the regulations of the Treasury Department governing consolidated returns, promulgated under the authority granted it under Section 2141 Title 26 U. S. C. A.

The Circuit Court of Appeals for the Tenth Circuit, reversing the trial court, held that the payment of liquidating dividends after affiliation broken, was not an intercompany transaction, but that the commissioner is not forbidden to take into account losses for 1929 and prior years, which were availed of by the petitioning parent corporation during the ten year consolidated return period, by offsetting the operating losses of its subsidiaries in such returns against the operating profits of this petitioning parent corporation. The Circuit Court of Appeals for the 10th Circuit held that the parent corporation, having availed itself of the operating losses in its consolidated returns during the consolidated return period, cannot either under the law existing previous to the revenue Act of 1928, nor under the Regulations thereafter promulgated by authority of the 1928 Revenue Act, Sec. 2141 Title 26, U. S. C. A., deduct the loss on its investment in the capital stock of the subsidiaries for the year 1929. The trial Court held, and this petitioner contends, that it is entitled to deduct such loss on its investment in the capital of the subsidiaries.

STATEMENT

The pertinent facts are as follows:

In 1917, the Petitioner purchased all of the capital stock of the Springer Trading Company and paid therefor, the sum of Forty thousand ($40,000.00) dollars. The Springer Trading Company was operated as an affiliated and going concern until November, 1929. During that period of time, the petitioner advanced to the Springer Trading Company the sum of $69,030.27 and in November, 1929, the Springer Trading Company sold all of its assets to outside interests, paid off all its obligations and ceased to function as a going concern. On December 23, 1929 the Springer Trading Company turned over to the petitioner the sum of $22,914.22, the net cash pro-

ceeds of its liquidation and as of December 31st, 1929, charged off $86,116.05 loss on its investment in the capital stock of the Springer Trading Company. In the taxable years 1918 to 1929, inclusive, the petitioner filed consolidated corporation income tax returns.

The profits of the Springer Trading Company heretofore returned $12,913.88; the aggregate net loss of the parent corporation on its investment in the Springer Trading Company's stock was $86,116.05 (Tr. of Rec. p. 68).

The Roy Trading Company was acquired in 1920, and the facts concerning its operation and liquidation are the same as the Springer Trading Company's.

The petitioner was never permitted, during the consolidated return periods, to charge off its losses on its investment in the stock of its subsidiaries, on its books. (See Exhibits F and H, pages 52 and 53 of the Tr. of Rec.)

The United States District Court for the District of New Mexico found in favor of this petitioner and this petitioner was awarded judgment against the Commissioner in the sum of $14,460.43, on account of overpayment of income taxes for the year of 1929. The Circuit Court of Appeals for the Tenth Circuit reversed the trial court's decision, holding that the operating losses of the subsidiaries having been availed of annually by the parent corporation in yearly returns over the consolidated return period, the parent company after affiliation broken, was not entitled to avail itself of the loss on its capital investment in the capital stock on liquidation, of its subsidiaries.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals in holding that the losses of the petitioner on its investment in the capital stock of its subsidiaries charged off from the parent corporation's books as a capital loss as of December 31, 1929, was not a deductible loss against its investment in the capital stock of such subsidiaries, has decided an important question of Federal law which has not been, but should be, decided by this Court.

2. The decision of the Tenth Circuit Court of Appeals herein, is in conflict with decisions of the 8th and 9th Circuit Courts of Appeal. The decision in the instant case is in conflict with the case of *McLaughlin*, Collector, v. *Pacific Lumber Company*, decided September 6, 1933, by the 9th Circuit Court, which is not yet reported in official law reports, but is to be found at p. 2300.101 Prentice-Hall, Vol. 1, 1933, wherein the 9th Circuit Court held such losses deductible. The *McLaughlin* case cannot be distinguished under the facts from the case at bar.

The decision in the instant case is also in conflict with a decision of the 8th Circuit Court of Appeals in the case of *Barnet* v. *Imperial Elevator Company*, decided by the 8th Circuit Court on July 20, 1933 and which is not yet reported, but found in Prentice-Hall, p. 2261, Vol. 1, 1933.

The Circuit Court of Appeals for the Fourth Circuit in the case of *Commissioner* of Internal Revenue v. *Apartment Corporation* in an opinion decided October 3, 1933, followed the decision of the Tenth Circuit Court of Appeals in the instant case, but recognized the conflict between its decision and that of the 9th Circuit Court of Appeals in the case of *McLaughlin* vs. *Pacific Lumber Company*, supra, using the following words:

> "Since the argument of this case, the Circuit Court of Appeals for the 9th Circuit has handed down an opinion dealing with the question involved here—McLaughlin v. Pacific Lumber Company decided September 6, 1933. For reasons given above, we cannot agree with the conclusions there reached."

The Fourth Circuit Court's opinion is not yet reported in an official report, but is found in Prentice-Hall, Vol. 1, 1933, p. 2300.176, paragraph 1800.

3. The question presented is one of great importance because it affects, from a consolidated return income tax point, an interpretation of the power delegated by Congress to make rules governing consolidated returns which will have the force and effect of law. Section 141 (a) of the Revenue Act

of 1928, Sec. 2141 Title 26, U. S. C. A. gives affiliated groups of corporations the privilege of making consolidated returns for the year 1929, and further provides:

> "The making of a consolidated return shall be upon the condition that all the corporations which have been members of the affiliated group at any time during the taxable year for which the return is made consent to all the regulations under subsection (b) *prescribed prior to the making of such return*; and the making of a consolidated return shall be considered as such consent."

Section 141 (c) reads:

> "In any case in which a consolidated return is made the tax *shall be determined*, computed, assessed, collected and adjusted *in accordance with the regulations* under subsection (b) *prescribed prior to the date on which such return is made.*" (Italics ours).

4. The Treasury Department promulgated Regulation 75 under the authority granted it by the terms of Section 2141, Title 26, U. S. C. A. and the applicable provisions of Regulations 75 are binding upon both the government and the taxpayer; and the express provisions of Regulations 75 require the allowance of the loss sustained by the petitioner in the year 1929 without deduction on account of operating losses sustained by the subsidiaries in years prior to 1929.

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari be granted to review the judgment of the United States Circuit Court of Appeals for the 10th Circuit in this case, which is numbered and entitled on its docket: "B. C. Hernandez, Collector of Internal Revenue for the District of New Mexico, Appellant vs. Charles Ilfeld Company, a New Mexico corporation, Appellee, No. 787."

CHARLES ILFELD COMPANY

By A. T. Hannett—P. O. Box 497,
Albuquerque,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINIONS OF THE COURTS BELOW

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit is reported in 66 Federal (2d) p. 236 (Tr. of Rec. pp. 134 to 144; On Re-hearing pp. 150 to 155).

II.

JURISDICTION

The judgment of the Circuit Court of Appeals was rendered in this case on the 13th day of July, 1933 (Tr. Rec. p. 145). A Petition for Re-hearing was thereafter filed and denied on the 10th day of October, 1933 (Tr. Rec. p. 156). Stay of Mandate was granted by the Circuit Court of Appeals for a period of thirty (30) days from the 19th day of October, 1933, for the petitioner herein to file this Petition with this Court.

The jurisdiction of this Court is invoked under Section 347, Title 28 U. S. C. A.

III.

STATEMENT OF THE CASE

A sufficiently full statement of the case has been given under the heading "Statement" in the Petition for Writ of Certiorari and, therefore, in the interest of brevity, the facts will not be repeated in this brief.

IV.

SPECIFICATIONS OF ERRORS

1. The Circuit Court of Appeals erred in reversing the United States District Court for the District of New Mexico.

2. The Circuit Court of Appeals erred in denying the petitioner the loss which it suffered on its investment in the capital stock of its subsidiaries—the Springer and Roy Trading Companies in the sum of $134,792.11.

3. The Circuit Court of Appeals erred in finding and holding that, irrespective of Treasury Regulations 75 promulgated by the Treasury Department under statutory authority (Section 2141 Title 26, U. S. C. A.) that the petitioner herein was not entitled to a deductible loss on the losses sustained by it on its investment in the capital stock of its subsidiaries.

4. The Circuit Court of Appeals erred in refusing to hold that since the Revenue Act of 1928, Section 2141 Title 26 U. S. C. A. imposed on corporations making consolidated returns, the following:

> "The making of a consolidated return shall be upon the condition that all the corporations which have been members of the affiliated group at any time during the taxable year for which return is made, consent to all the regulations under subsection (b) prescribed prior to the making of such returns; and the making of such a consolidated return shall be considered as such consent."

the Commissioner was not bound to allow the deductible loss here claimed under the provisions of paragraph 2, of subdivision (c) of Article 34, Regulations 75 quoted in Appendix.

5. The Circuit Court of Appeals erred in refusing to hold that both the Government and the petitioner were bound by the applicable provisions of Regulations 75 and that the express provisions of Regulations 75 require the allowance of the loss sustained by the petitioner in the year 1929 without reduction on account of operating losses sustained by the subsidiaries in the years prior to 1929.

V.

ARGUMENT

POINT I.

THE CIRCUIT COURT OF APPEALS ERRED IN REVERSING THE UNITED STATES DISTRICT COURT AND IN DENYING THE PETITIONER THE LOSS IT SUFFERED ON ITS INVESTMENT IN THE CAPITAL STOCK OF ITS SUBSIDIARIES THE SPRINGER AND ROY TRADING COMPANIES IN THE SUM OF $134,792.11.

There is no necessary correlation between the taxation of operating profits, or the deduction of operating losses by a *corporation* and the taxation of gains or the deduction of losses by a *stockholder* from his investment in it. Whether or not the corporation's gains or losses are reflected in the price the stockholder pays or receives for his stock, the income tax law treats the two taxpayers, the corporation and the stockholder, as entirely separate, and taxes their gains independently. Thus X Corporation may have had operating profits of $1,000,000, on all of which it has paid the tax. As a result of these profitable operations, the shares of stock in X owned by A may have advanced from their cost of $100,000 to a market value of $200,000. If X corporation is liquidated and A receives $200,000, as his dividend, A will be compelled to pay an income tax on $100,000 profit, irrespective of the fact that the X corporation has previously paid a tax on these same profits as earned. This Court has held that this double taxation is not invalid, *Hellmich* v. *Hellman* (276 U. S. 233). The converse is also true. As was said in the case of *United Publishers Corporation* v. *Anderson*, reported in 42 Fed. (2d) p. 781:

> "In principle this case cannot be distinguished from Remington Rand, Inc. v. Commissioner of Internal Revenue (C. C. A.) 33 Fed. (2d) 77, certiorari denied in 280 U. S. 591, 50 Sup. Ct. 39, 74 L. Ed. 639. It was there held that where a parent corporation sold its stockholdings in a subsidiary, the excess of the selling price over the cost of the stock was taxable as a profit realized by the parent.

> The fact that the parent had for several years filed consolidated returns was held immaterial, as was also the fact that the subsidiary had accumulated earnings during these years, which earnings had been included in the consolidated earnings and thus taxed. The Government's contention was upheld in both respects. Here we have the exact converse. Here the sale of the stock was at a loss, and the operations of the subsidiary had been conducted at a loss over the years when consolidated returns were filed. The taxpayer is therefore warranted in insisting: first, that upon the sale of the Journal of Commerce stock it suffered a loss of $161,091.85, to the same effect as upon the sale of any other property; and, second, that the fact that the Journal of Commerce Company's operating losses had been taken advantage of by the plaintiff in its payment of taxes on the consolidated basis is of no consequence."

The Tenth Circuit Court of Appeals disposes of this contention, in its original opinion (Tr. of Rec. p. 142) by saying:

> "The plaintiff argues that since in arriving at capital gain, operating profits which have been returned for taxes are not taken into the equation, operating losses which have been allowed as deductions should not be considered. There is some logic and convenience in a clear separation of capital losses from operating losses. There is rough equity in the plaintiff's position that what is sauce for the goose should be sauce for the gander."

It is well established that the provisions authorizing consolidated returns do not change the substantive law to make the affiliated group into a single corporation. They authorize merely a form or method of reporting income. The affiliated corporations remain separate entities, but their respective incomes and deductions are reported on a single return. Thus it has been frequently held that the liability to pay the tax rests upon the several affiliated corporations individually. As the Supreme Court said in *Woolford Realty Co.* v. *Rose* (286 U. S. 319):

> " . . . . The fact is not to be ignored that each of two or more corporations joining (under Sec. 240) in a consolidated return is none the less a taxpayer. Commissioner of Internal Revenue v. Ben Ginsburg Co. (C. C. A. 2d) 54 F. (2d) 238, 239. By the express terms of the statute (Sec. 240 b) the tax when computed is to be assessed, in the absence of agreement to the contrary, upon the respective affiliated corporations 'on the basis of the net income properly assignable to each.' 'The term "taxpayer" means any person subject to a tax, imposed by this Act.' Revenue Act of 1926, Sec. 2a (9) (U. S. C. Title 26, Sec. 1262). A corporation does not cease to be such a person by affiliating with another." (at p. 328).

In the latter case, it was *held* that a parent corporation could *not* deduct on a consolidated return net losses of a subsidiary sustained before affiliation. Even, if the subsidiaries' losses were sustained *during* affiliation, it has been uniformly held, following the *Woolford* case, that the net losses cannot be applied against the income of the parent in a subsequent year. See: *Delaware & Hudson Co. v. Comm'r.* 65 Fed. (2d) 292. The two corporations are regarded as separate entities, and the net loss of the one cannot be carried forward and applied against the income of the other in a later year.

Consequently, when deductions were taken in the consolidated return for the operating losses of two subsidiary corporations, the deductions belonged to those corporations and were taken by them. The parent corporation obtained a benefit from the loss, only by virtue of the statute, whereby the parent was permitted to offset the loss of another taxpayer against its own income. The parent suffered no loss of its own until it liquidated the two subsidiaries in *1929*. In that year, it unquestionably did suffer a loss on its investment in the subsidiaries' stock. The fact that the *subsidiaries* had previously had operating losses or had been permitted by Congress to report them in a consolidated return has no bearing upon the reality or the deductibility of the *parent's* own loss on its investment. This is well brought out in the recent case of *Burnet v. Imperial Elevator Co.*, decided by the Circuit Court of Appeals for the Eighth Circuit on July 20, 1933. In that case, a subsidiary had had operating losses,

which were deducted on consolidated returns for prior years. In 1923, the subsidiary was liquidated, the parent receiving nothing on the liquidation. It, therefore, deducted the full cost of the stock in the subsidiary in that year, and sought to carry it forward as a net loss. The Commissioner urged that the parent was attempting to obtain a double deduction. The Court *held* that the deduction was allowable, saying:

> "Operating losses of the subsidiary are, obviously different from losses on the stock held by the taxpayer, and the Board expressly finds that no deduction was taken for the stock loss in that year."

This case is directly in point here, and the Circuit Court of Appeals for the 9th Circuit in the case of *McLaughlin* vs. *Pacific Lumber Company* decided on September 6, 1933, (not yet reported in an official report, but found at page 2300.101 Prentice-Hall, Vol. 1, 1933) under facts which cannot be distinguished from the facts in the case at bar, held that a similar loss was deductible. The same two questions were raised in *McLaughlin* v. *Pacific Lumber Company*, supra, that were raised in the courts below in this case: that the payment of the liquidating dividends was an inter-company transaction; and if not an inter-company transaction, the losses were fully and effectively recovered by the petitioner for tax purposes by deductions taken in the consolidated returns for previous years. The Circuit Court of Appeals for the 9th Circuit decided both these issues against the government, and in favor of the taxpayer under facts identical with the facts in the case at bar.

The Circuit Court of Appeals for the Fourth Circuit has followed the decision of the Circuit Court of Appeals for the Tenth Circuit in the instant case, in a decision handed down October 3, 1933, in the case of *Commissioner* of Internal Revenue vs. *The Apartment Corporation*, No. 3484 on the docket of the United States Circuit Court of Appeals for the Fourth Circuit. By reason of the conflict of decisions in the four circuits in question, taxpayers in the 8th and 9th Circuits are now permitted to avail themselves of losses similar to the loss here claimed, as deductible, while taxpayers in the 4th and 10th Circuits are denied the right to deduct these losses.

POINT No. II.

THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT ERRED IN REFUSING TO HOLD THAT SINCE SECTION 2141 TITLE 26 U. S. C. A. IMPOSED UPON CORPORATIONS MAKING CONSOLIDATED RETURNS THE CONDITION THAT THEY CONSENT TO ALL REGULATIONS PROMULGATED THEREUNDER BY THE TREASURY DEPARTMENT, THAT THE TREASURY DEPARTMENT WAS NOT BOUND BY THE APPLICABLE PROVISIONS OF REGULATIONS 75 AND THE EXPRESS PROVISIONS OF REGULATIONS 75 REQUIRE THE ALLOWANCE OF THE LOSS SUSTAINED BY THE PETITIONER IN THE YEAR 1929 WITHOUT REDUCTION ON ACCOUNT OF OPERATING LOSSES SUSTAINED BY THE SUBSIDIARIES IN YEARS PRIOR TO 1929.

Prior to 1929, regulations promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury did not prevent the Government from taking a position contrary to their provisions, as is evidenced by numerous retroactive changes in the regulations, later sustained by the courts. With respect to the regulations promulgated by the Commissioner governing the tax liability of affiliated corporations for the year 1929 and subsequent years, the situation is made entirely different by express statutory provision. Section 141 (a) of the Revenue Act of 1928 —Sec. 2141 Title 26, U.S.C.A. gives affiliated groups of corporations the privilege of making consolidated returns for the year 1929 and further provides:

> "The making of a consolidated return shall be upon the condition that all the corporations which have been members of the affiliated group at any time during the taxable year for which the return is made consent to all the regulations under subsection (b) *prescribed prior to the making of such return;* and the making of a consolidated return shall be considered as such consent." (Italics ours).

This makes the provisions of the regulations binding upon affiliated corporations filing a consolidated return for the year 1929. Likewise, the Government is bound by the provisions of the regulations. Section 141 (c) providing:

> "In any case in which a consolidated return is made the tax *shall be determined*, computed, assessed, collected, and adjusted *in accordance with the regulations* under sub-section (b) *prescribed prior to the date on which such return is made.*" (Italics ours).

It will be observed that in each of the excerpts above quoted it was carefully provided that the regulations in accordance with which the tax must be determined shall have been prescribed prior to the date on which the return is made. For this reason the consolidated returns regulations prescribed by the Commissioner under Section 141 are frequently spoken of as contractual. The bargain cannot be varied by either party.

That this was the object of Congress in enacting Section 141 is shown by the report of the Senate Committee on Finance (Senate Report No. 960, 70th Congress, First Session) at page 15:

> "The committee believes it to be impracticable to attempt by legislation to prescribe the various detailed and complicated rules necessary to meet the many differing and complicated situations. Accordingly, it has found it necessary to delegate power to the commissioner to prescribe regulations *legislative in character* covering them." (Italics ours).

Regulations 75, prescribed by the Commissioner in accordance with the authority granted in Section 141 (b), recognizes the obligation of the Government to be bound by its provisions. Article I (b) provides:

> "The tax liability of the members of the affiliated group for such year will be determined in accordance with such regulations and without regard to any amendment thereto promulgated subsequent to the filing of such return."

The Commissioner thus expressly disclaims the right to make retroactive changes in the consolidated returns regulations for 1929. Nor has he attempted to do so in this case.

The provisions of Regulations 78, prescribed under Section 141 of Revenue Act of 1932, governing consolidated returns for 1932 and subsequent years, so far as they relate to the problem presented in this case, are not different from the corresponding provisions of Regulations 75. Moreover, the Commissioner expressly states in Regulations 78 under the heading "Application of Regulations": "The regulations applicable to the taxable years 1929, 1930 and 1931 will be found in Regulations 75.".

The problem presented by this case is therefore governed solely by the applicable provisions of Regulations 75.

The very first of many difficult and complicated problems arising in the administration of consolidated returns provisions on which the Congress intended to delegate power to the Commissioner to prescribe regulations legislative in character was the problem presented by the instant case. When the Commissioner promulgated Regulations 75 he departed from, we think, an unvarying precedent, and quoted in support of his authority to prescribe regulations the statement made in the report of the Committee on Finance above referred to (noting also a similar statement of the managers on the part of the House), beginning as follows:

> "Among the regulations which it is expected that the commissioner will prescribe are: (1) The extent to which gain or loss shall be recognized upon the sale by a member of the affiliated group of stock issued by any other member of the affiliated group or upon dissolution (whether partial or complete) of a member of the group; * * *".

Carrying out the desire of Congress, thus expressed, that he legislate upon this subject, the Commissioner provided in Regulations 75 the precise method of calculating the taxable gain or deductible loss resulting to a corporation whose subsidiary is dissolved in the taxable year 1929. Article 37 deals with "Dissolutions—Recognition of Gain or Loss." As the opinion of the Circuit Court demonstrates, the transaction out of which the claimed loss arose did not occur during the consolidated return period, the affiliation having been termi-

nated prior to liquidation, and therefore is not to be disregarded as having arisen upon a distribution required under Article 37 (a) to be considered an intercompany transaction. Since the distribution occurred after the consolidated return period, Article 37 (b) is in terms applicable:

> "Any such distribution after a consolidated return period, whether in complete or partial liquidation, shall be treated as a sale of the stock, and the adjustments specified in articles 34 and 35 will be made, and article 36 will be applicable."

Article 36 has no bearing in this case.

The adjustments specified in Article 34 (which affects the determination of the loss on the stock investment of the petitioner, while Article 35 affects the determination of the loss on the inter-company accounts receivable) are contained, so far as applicable to the facts of this case, in paragraph (c) (2). Paragraph (c) prescribes the ordinary basis for determining gain or loss, with a provision for an aggregate basis where several affiliated corporations own the stock of the issuing corporation concerned, and provides for the following adjustment:

> "(2) From the sum of the aggregate bases, as determined in paragraph (1) above, there shall be deducted the aggregate of the losses of such issuing corporation sustained during each of the consolidated return periods (*including only the taxable year 1929 and subsequent taxable years*) after such corporation became a member of the group and prior to the sale of the stock, to the extent that such losses could not have been availed of by such corporation as a net loss in computing its tax for such periods if it had made a separate return for each of such periods." (Italics ours).

It is impossible to spell out more plainly than in the words of this regulation that no part of any losses sustained by the issuing corporation (the liquidated subsidiary) for 1928 or any prior year is to be deducted from the basis for determin-

ing gain or loss on the liquidation. To hold otherwise would be to write the word "only" out of the regulation.

The losses sustained by reason of the non-payment of advances made by the petitioner to the subsidiaries liquidated in 1929 stand on the same footing as the losses sustained upon the stock investment. Article 40 of Regulations 75 entitled "Bad Debts" provides in paragraph (e), "Limitation on Allowance after Consolidated Return Period":

> "The rules applicable to the allowance of losses upon the sale of bonds shall be applicable to the allowance after the consolidated return period as a bad debt of an intercompany account receivable or other obligation resulting from an intercompany transaction during the consolidated return period. (See article 35)."

Article 35, entitled "Sale of Bonds—Basis for determining Gain or Loss," provides for determining the basis of each bond in accordance with the act, adding

> "but the amount of any loss otherwise allowable shall be decreased by the excess (if any) of the aggregate of the deductions *computed under paragraph* (c) (2) of article 34 over the aggregate of the basis of the stock of the issuing corporation as computed under paragraph (c) (1) or (d), as the case be, held by the members of the affiliated group." (Italics ours).

As we have shown above, no deduction is to be made under paragraph (c) (2) of Article 34 from the basis of stock on account of operating losses of the issuing corporations for years prior to 1929, and there is no excess of such deductions available to reduce the basis of bonds, and therefore of these intercompany accounts receivable, under the present circumstances.

It follows that the losses sustained by the petitioner on both the stock and the intercompany accounts receivable are unaffected by operating losses of the subsidiaries unless they occurred in the taxable year 1929.

CONCLUSION

It is therefore respectfully submitted that under the statute and under the Regulations, no other result can be reached than a reversal of the Judgment of the Circuit Court and an affirmance of the decision of the trial court in favor of the taxpayer. It is earnestly represented, moreover, that the Courts should permit no shadow of doubt to fall upon the inviolability of the consolidated returns regulations—contractual in their effect as between government and taxpayer, legislative in their force upon both, and ever since their promulgation, relied upon by affiliated groups of corporations throughout the land as stating the exact tax consequences of transactions which, without such assurances, they might not have undertaken.

Had the petitioner herein filed a separate return for itself and for each of its subsidiaries in 1929, the parent corporation would have been entitled, under any theory of the law or the departmental regulations, to this deduction. Neither the decision in the Fourth, Eighth, or Ninth Circuits involved Section 2141, Title 26, U.S.C.A., or the rules promulgated thereunder, and this case, so far as the petitioner is advised, is the first one ever presented to this Court for an interpretation of the 1928 Act, and the rules promulgated thereunder, touching consolidated returns.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court, of its supervisory powers and that to such an end, the Writ of Certiorari prayed for, should be granted.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX

STATUTES AND REGULATIONS REFERRED TO IN PETITION AND BRIEF.

REVENUE ACT OF 1928

Section 2141, Title 26, U. S. C. A.

"Consolidated returns of Corporations—1929 and subsequent taxable years.

(a) Privilege to File Consolidated Returns. An affiliated group of corporations shall, subject to the provisions of this section, have the privilege of making a consolidated return for the taxable year 1929 or any subsequent taxable year, in lieu of separate returns. The making of a consolidated return shall be upon the condition that all the corporations which have been members of the affiliated group at any time during the taxable year for which the return is made, consent to all the regulations under subsection (b) prescribed prior to the making of such return; and the making of a consolidated return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year the consolidated return shall include the income of such corporation for such part of the year as it is a member of the affiliated group.

(b) Regulations. The Commissioner, with the approval of the Secretary, shall prescribe such regulations as he may deem necessary in order that the tax liability of an affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be determined, computed, assessed, collected, and adjusted in such manner as clearly to reflect the income and to prevent avoidance of tax liability.

(c) Computation and payment of Tax. In any case in which a consolidated return is made the tax shall be determined, computed, assessed, collected, and adjusted in accordance with the regulations under subsection (b) prescribed prior to the date on which such return is made. Only one specific credit, computed as provided in section 2026 (b), shall be allowed in computing the tax."

TREASURY REGULATIONS 75, PROMULGATED BY THE TREASURY DEPARTMENT PURSUANT TO THE AUTHORITY GRANTED BY THE TERMS OF THE ABOVE STATUTE.

SALES WHICH BREAK AFFILIATION MADE WHILE SELLING CORPORATION IS MEMBER OF GROUP:

Paragraph 2, of subdivision (*c*), Article 34:

> "From the sum of the aggregate bases, as determined in paragraph (1) above, there shall be deducted the aggregate of the losses of such issuing corporation sustained during each of the consolidated return periods (*including only the taxable year 1929 and subsequent taxable years*) after such corporation became a member of the group and prior to the sale of the stock *to the extent that such losses could not have been availed of by such corporation as a net loss in computing its tax for such periods if it had made a separate return for each of such periods.*" (Italics ours).

Subdivision (b) of Article 37, Regulations 75, reads:

> "After Consolidated Return Period. Any such distribution after a consolidated return period, whether in complete or partial liquidation, shall be treated as a sale of stock, and the adjustments specified in Articles 34 and 35 will be made, and Article 36 will be applicable."

Subdivision (*c*) of Article 40, Regulations 75, reads:

"Limitation on allowance after Consolidated Return Period.

> The rules applicable to the allowance of losses upon the sale of bonds shall be applicable to the allowance after the consolidated return period as a bad debt of an intercompany account receivable or other obligation resulting from an intercompany transaction during the consolidated return period. (See Article 35)."

Subdivision (a) Article 37, Regulations 75, reads:

> "Gain or loss shall not be recognized upon a distribution during a consolidated return period, by a member of an affiliated group to another member of such group, in cancellation or redemption of all or any portion of its stock; and any such distribution shall be considered an intercompany transaction."

FILE COPY

No. 579

In the Supreme Court of the United States

OCTOBER TERM, 1933

CHARLES ILFELD COMPANY, PETITIONER

vs.

B. C. HERNANDEZ, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF NEW MEXICO

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

No written opinion was rendered by the District Court. That court's findings of fact and conclusions of law will be found in the record at pp. 19 to 25. The original opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 111-120) is reported in 66 Federal (2d) p. 236. An opinion rendered on the Petition for Rehearing (R. 125-129) is reported in 67 Federal (2d) p. 236. The judgment of the Circuit Court of Appeals for the Tenth Circuit was entered July 13th, 1933 (R. 120-121) and Petition for rehearing was filed August 10th, 1933 (R. 121-124) and was denied on the 10th day of October, 1933 (R. 125-129). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE

Petitioner brought this suit in the District Court for New Mexico, for the recovery of income tax paid for the year 1929 (R. 1-4). Jury trial was waived in writing (R. 11) and the Court made Findings of Fact and Conclusions of Law (R. 19-25). The findings may be summarized as follows:

Petitioner purchased all of the capital stock of the Springer Trading Company in 1917 and all of the capital stock of Roy Trading Company in 1920, and operated both corporations as affiliated or subsidiary corporations from the dates of such purchase up to and including the month of November, 1929. During such years of operation, the petitioner filed consolidated returns and offset the operating losses of its said subsidiaries against its, the parent's, operating profits during the period of affiliation (R. 19-22),

The petitioner paid the sum of $40,000.00 for the Springer Trading Company stock and during the period from 1917 to 1929 advanced and loaned to the latter company, the sum of $69,030.27. During the year 1929 up to and including the month of November, the Springer Trading Company liquidated and sold all of its assets to outside interests and paid off all its obligations. On the 23d of December, 1929, the Springer Trading Company turned over to the petitioner, the cash proceeds derived from liquidation in the sum of $22,914.22. Petitioner sustained a loss on its capital investment in the Springer Trading Company in the sum of $86,116.05, which was charged off

the petitioner's books as a loss on the 31st day of December, 1929 (Finding of Fact No. 2; R. 20-21). The petitioner paid the sum of $50,000.00 for the Roy Trading Company stock and during the period from 1920 to 1929 advanced and loaned the latter company the sum of $9,782.22. During the year 1929, up to and including the month of November, the Roy Trading Company liquidated and sold all of its assets to outside interests and paid all of its obligations. On December 23d, 1929, the Roy Trading Company turned over to the petitioner the cash proceeds derived, the sum of $15,106.16. The petitioner sustained a loss on its capital investment in the Roy Trading Company in the sum of $44,676.06, which was charged off petitioner's books as a loss, as of December 31, 1929 (R. 21, Finding of Fact No. 3). Both the Springer Trading and the Roy Trading Companies were liquidated and dissolved in the month of November, 1929 (R. 21—Finding of Fact No. 4).*

*It was stipulated and agreed by the parties in the trial Court (R. 26-27) that the audit made by the Treasury Department (plaintiff's Exhibit "A") and which contains the ruling of the Respondent, denying petitioner's claim, should be received in evidence as to the facts and figures governing this cause, except that the petitioner did not agree with the conclusions of law in such report, nor to the method by which the loss sustained by the petitioner was charged off. The Court's finding that the subsidiaries were liquidated and dissolved in November is based on the auditor's report, and the commissioner's rulings thereon (R. 30) wherein the report reads:

"Charles Ilfeld Company owned one hundred per cent of the capital stock of each of the two subsidiaries until they were liquidated and dissolved in November, 1929," and on the undisputed testimony of the witness Rodney B. Horton (R. 52-53).

In the year 1930, the petitioner filed its consolidated returns covering its operations and those of the Roy and Springer Trading Companies, without deducting the losses sustained by it on liquidation and dissolution of the two subsidiaries and paid to the Collector of Internal Revenue the sum of $20,836.20 in equal quarterly installments (R. 22 Finding of Fact No. 5). Thereafter, in May, 1931, the petitioner filed an amended return and claim for refund for the year 1929, setting up these losses as deductible which was, by the Commissioner of Internal Revenue of the United States, disallowed on the 28th day of January, 1932. (R. 22 Finding of Fact No. 5).

The petitioner has claimed and been allowed in the aggregate, as deductions from its own net operating income for the taxable years 1918 to 1928 inclusive, the operating losses of its subsidiaries during that period, the total sum of $131,424.41 and charged with and taxed upon operating profits of said subsidiaries in the total sum of $12,913.88, or allowed aggregate net deductions from its own taxable net income of $118,510.53 on account of operating losses sustained by the Springer Trading Company (R. 23; Finding of Fact No. 7).

Petitioner has claimed and been allowed, in the aggregate, as deductions from its own net current operating income for the taxable years 1920 to 1929, inclusive, a total sum of $61,535.17 and charged with and taxed upon the profits in the total sum of $4,407.32 or allowed aggregate net deductions from its own taxable

net income of $58,127.85 on account of the operating losses sustained by the Roy Trading Company (R. 23-24 Finding of Fact No. 8).

The Court found the allegations of the petitioner's complaint to be true and the issues generally in favor of the petitioner (R. 24, Finding of Fact No. 9) and rendered judgment for the petitioner in the sum of $14,460.43 with interest (R. 25).

From the foregoing Findings of Fact, the trial court made the following Conclusions of Law (R. 24):

CONCLUSION OF LAW NO. 1

That the liquidating dividends paid over by the subsidiary corporations, the Springer Trading Company and the Roy Trading Company, to the plaintiff in the month of December, were not paid over in cancellation or redemption of any part or portion of the stock of said corporations, nor was such payment in either instance an inter-company transaction.

CONCLUSION OF LAW NO. 2

That the period of time from January first, 1929, up to and including the month of November, 1929, when the affiliations between the two subsidiary companies and the plaintiff parent corporation were broken by liquidation, constituted a consolidated return period; and the payment over of the liquidating dividends by said subsidiary companies in December, 1929, was not made during a consolidated return period.

The commissioner charged the petitioner's capital losses on its investment in the subsidiaries to the par-

SPECIFICATIONS OF ASSIGNED ERRORS

The Circuit Court of Appeals erred in reversing the United States District Court of New Mexico in the following particulars:

I.

The Circuit Court of Appeals erred in finding and holding that, irrespective of Treasury Regulations 75 promulgated by the Treasury Department under statutory authority (Section 2141 Title 26 U.S.C.A.) the petitioner herein was not entitled to deduct the losses sustained by it on its capital investment in its subsidiaries; and in refusing to hold that since the Revenue Act of 1928, Section 2141 Title 26 U.S.C.A. imposed upon corporations making consolidated returns the following:

> "The making of a consolidated return shall be upon the condition that all the corporations which have been members of the affiliated group at any time during the taxable year for which return is made, consent to all the regulations under subsection (b) prescribed prior to the making of such returns; and the making of such a consolidated return shall be considered as such consent,"

the Commissioner was not bound to allow the deductible loss here claimed under the provisions of Paragraph 2 of subdivision (c) of Article 34, Regulations 75, quoted in Appendix. (p. 38); and in refusing to hold that both the government and the petitioner were bound by the applicable provisions of Regulations 75 and denying petitioner's loss, when the express provisions require the allowance of the loss sustained by the petitioner in the year 1929 without reduction on

account of operating losses sustained by the subsidiaries in the years prior to 1929.

II.

The Circuit Court of Appeals erred in denying petitioner's loss which it suffered on the investment of its subsidiaries, to-wit: The Springer Trading Company in the sum of $86,116.05 and the Roy Trading Company in the sum of $44,676.06 with interest; and in holding and finding such claimed loss would be a double deduction.

SUMMARY.

Both parties to this cause agree that this case is governed by Section 141 (a) of the Revenue Act of 1928,—Section 2141, Title 26, U. S. C. A. set forth at length in the appendix (p. 35), and the rules of the Treasury Department, Regulations 75, promulgated by the authority of the statute. The petitioner contends that this cause is governed by subdivision (b)[1] of Article 37, Regulations 75 and paragraph 2 of subdivision (c)[2] of Article 34. The respondent in

[1] Art. 37 (b): "Any such distribution after a consolidated return period, whether in complete or partial liquidation after a consolidated return period, shall be treated as a sale of the stock, and the adjustments specified in articles 34 and 35 will be made, and article 36 will be applicable."

[2] Art. 34 (c) Par. 2: "From the sum of the aggregate bases, as determined in Paragraph (1) above, there shall be deducted the aggregate of the losses of such issuing corporation sustained during each of the consolidated return periods (including only the taxable year 1929 and subsequent taxable years) after such corporation became a member of the group and prior to the sale of the stock to the extent that such losses could not have been availed of by such corporation as a net loss in computing its tax for such periods if it had made a separate return for each of such periods."

both the trial and Circuit Courts and in its brief opposing the Writ of Certiorari, in this Court, contended that this cause is governed by Subdivision (a) of Article 37* Regulations 75.

There are no decisions interpreting Section 2141 Title 26 U. S. C. A. or the rules governing consolidated returns promulgated thereunder by this Court, and the decision of the Circuit Court in this cause is the only decision, ruling on said statute, and the rules promulgated thereunder, so far as this petitioner is advised.

The Circuit Court of Appeals held that the payment of the liquidating dividends was not an intercompany transaction, but reversed the trial court on the ground that the operating losses of the subsidiaries during affiliation having been offset against the operating income of the parent, it would be a double deduction to permit the parent to charge off its loss on its investment in the subsidiaries on liquidation, after affiliation was broken.

ARGUMENT

SPECIFICATION OF ASSIGNED ERROR NO. I

The Circuit Court of Appeals erred in finding and holding that, irrespective of Treasury Regulations 75 promulgated by the Treasury Department under statutory authority (Section 2141 Title 26 U. S. C. A.) the

*Art. 37 (a): "Gain or loss shall not be recognized upon a distribution during a consolidated return period, by a member of an affiliated group to another member of such group, in cancellation or redemption of all or any portion of its stock; and any such distribution shall be considered an intercompany transaction."

petitioner herein was not entitled to deduct the losses sustained by it on its capital investment in its subsidiaries; and in refusing to hold that since the Revenue Act of 1928, Section 2141 Title 26, U. S. C. A. imposed on corporations making consolidated returns the following:

> **"The making of a consolidated return shall be upon the condition that all the corporations which have been members of the affiliated group at any time during the taxable year for which return is made, consent to all the regulations under subsection (b) prescribed prior to the making of such returns; and the making of such a consolidated return shall be considered as such consent."**

the commissioner was not bound to allow the deductible loss here claimed under the provisions of Paragraph 2 of subdivision (c) of Article 34 Regulations 75 (quoted in Appendix p. 38) and in refusing to hold that both the government and the petitioner were bound by the applicable provisions of Regulations 75 and that the express provisions of Regulations 75 require the allowance of the loss sustained by the petitioner in the year 1929 without reduction on account of operating losses sustained by the subsidiaries in the years prior to 1929.

Prior to 1929, regulations promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, did not prevent the Government from taking a position contrary to their provisions, as is evidenced by numerous retroactive changes in the regulations, later sustained by

the courts. With respect to the regulations promulgated by the commissioner governing the tax liability of affiliated corporations for the year 1929 and subsequent years, the situation is made entirely different by express statutory provision. Section 141 (a) of the Revenue Act of 1928—Section 2141 Title 26, U. S. C. A. gives affiliated groups of corporations the privilege of making consolidated returns for the year 1929 and further provides:

> "The making of a consolidated return shall be upon the condition that all the corporations which have been members of the affiliated group at any time during the taxable year for which the return is made consent to all the regulations under subsection (b) prescribed prior to the making of such return; and the making of a consolidated return shall be considered as such consent."

This makes the provisions of the regulations binding upon affiliated corporations filing a consolidated return for the year 1929. Likewise, the government is bound by the provisions of the regulations, Section 141 (c) providing:

> "In any case in which a consolidated return is made the tax shall be determined, computed, assessed, collected and adjusted in accordance with the regulations under subsection (b) prescribed prior to the date on which such return is made."

It will be observed that in each of the excerpts above quoted, it was carefully provided that the regulations in accordance with which the tax must be determined

shall have been prescribed prior to the date on which the return is made. For this reason the consolidated returns regulations prescribed by the commissioner under Section 141 are frequently spoken of as contractual. The bargain cannot be varied by either party.

That this was the object of Congress in enacting Section 141 is shown by the report of the Senate Committee on Finance (Senate Report 960, 70th Congress, First Session) at page 15:

> "The committee believes it to be impractible to attempt by legislation to prescribe the various detailed and complicated rules necessary to meet the many differing and complicated situations. Accordingly, it has found it necessary to delegate power to the commissioner to prescribe regulations legislative in character covering them."

Regulations 75 prescribed by the commissioner in accordance with the authority granted in Section 141 (b) recognizes the obligation of the government to be bound by its provisions. Article 1 (b) provides:

> "The tax liability of the members of the affiliated group for such year will be determined in accordance with such regulations and without regard to any amendment thereto promulgated subsequent to the filing of such return."

The Commissioner thus expressly disclaims the right to make retroactive changes in the consolidated regulations for 1929. Nor has he attempted to do so in this case. The provisions of Regulations 78, prescribed under Section 141 of Revenue Act of 1932, gov-

erning consolidated returns for 1932 and subsequent years, so far as they relate to the problem presented in this case, are not different from the corresponding provisions of Regulations 75. Moreover, the commissioner expressly states in Regulations 78 under the heading "Application of Regulations": "The regulations applicable to the taxable years 1929, 1930 and 1931 will be *found in Regulations 75.*"

The problem presented by this case is therefore governed solely by the applicable provisions of Regulations 75.

The very first of many difficult and complicated problems arising in the administration of consolidated returns provisions on which the Congress intended to delegate power to the commissioner to prescribe regulations legislative in character was the problem presented by the instant case. When the commissioner promulgated Regulations 75 he departed from, we think, an unvarying precedent, and quoted in support of his authority to prescribe regulations the statement made in the report of the Committee on Finance above referred to (noting also a similar statement of the managers on the part of the House), beginning as follows:

> "Among the regulations which it is expected that the commissioner will prescribe are: (1) The extent to which gain or loss shall be recognized upon the sale by a member of the affiliated group of stock issued by any other member of the affiliated group or upon dissolution (whether partial or complete) of a member of the group; * * * "

Carrying out the desire of Congress, thus expressed, that he legislate upon this subject, the Commissioner provided in Regulations 75 the precise method of calculating the taxable gain or deductible loss resulting to a corporation whose subsidiary is dissolved in the taxable year 1929. Article 37 deals with "Dissolutions—Recognition of Gain or Loss." As the opinion of the *Circuit Court demonstrates, the transaction out of* which the claimed loss arose did not occur during the consolidated return period, the affiliation having been terminated prior to liquidation, and therefore is not to be disregarded as having arisen upon a distribution required under Article 37 (a) to be considered an intercompany transaction. Since the distribution occurred after the consolidated return period, Article 37 (b) is in terms applicable:

> "Any such distribution after a consolidated return period, whether in complete or partial liquidation, shall be treated as a sale of the stock, and the adjustments specified in articles 34 and 35 will be made, and article 36 will be applicable."
>
> Article 36 has no bearing in this case.

The adjustments specified in Article 34 (which affects the determination of the loss on the stock investment of the petitioner, while Article 35 affects the determination of the loss on the intercompany accounts receivable) are contained, so far as applicable to the facts of this case in paragraph 2, subdivision (c). Subdivision (c) paragraph 2 prescribes the ordinary basis for determining gain or loss, with a provision for

an aggregate basis where several affiliated corporations own the stock of the issuing corporation concerned, and provides for the following adjustment:

> "(2) From the sum of the aggregate bases, as determined in paragraph (1) above, there shall be deducted the aggregate of the losses of such issuing corporation sustained during each of the consolidated return periods (including only the taxable year 1929 and subsequent taxable years) after such corporation became a member of the group and prior to the sale of the stock, to the extent that such losses could not have been availed of by such corporation as a net loss in computing its tax for such periods if it had made a separate return for each of such periods."

It is impossible to spell out more plainly than in the words of this regulation that no part of any losses sustained by the issuing corporation (the liquidation subsidiaries) for 1928 or any prior year is to be deducted from the basis for determining gain or loss on the liquidation. To hold otherwise would be to write the word "only" out of the regulation.

The losses sustained by reason of the non-payment of advances made by the petitioner to the subsidiaries liquidated in 1929 stand on the same footing as the losses sustained upon the stock investment. Article 40, Regulations 75, entitled "Bad Debts" provides in paragraph (c), "Limitation on Allowance after Consolidated Return Period":

> "The rules applicable to the allowance of losses upon the sale of bonds shall be applicable to the al-

lowance after the consolidated return period as a bad debt of an intercompany account receivable or other obligation resulting from an intercompany transaction during the consolidated return period. (See Art. 35)."

Article 35, entitled "Sale of Bonds—Basis for determining Gain or Loss," provides for determining the basis of each bond in accordance with the act, adding:

"but the amount of any loss otherwise allowable shall be decreased by the excess (if any) of the aggregate of the deductions computed under paragraph (c) (2) of article 34 over the aggregate of the basis of the stock of the issuing corporation as computed under paragraph (c) (1) or (d) as the case be, held by the members of the affiliated group."

As we have shown above, no deduction is to be made under paragraph (c) (2) of Article 34 from the basis of stock on account of operating losses of the issuing corporations for years prior to 1929, and there is no excess of such deductions available to reduce the basis of bonds, and therefore of these intercompany accounts receivable, under the present circumstances.

It follows that the losses sustained by the petitioner on both the stock and the intercompany accounts receivable are unaffected by operating losses of the subsidiaries unless they occurred in the taxable year 1929.

The lower court, in its decision on the Petition for Rehearing, (R. 126) said:

"Counsel for appellee, upon the assumption that we held that section 37 (b) was applicable, now di-

Treasury rules in the instant case is neither unjust nor anomalous. Had the subsidiaries made a profit and been taxed through the affiliated years, they would have been again taxed on liquidation. "What is sauce for the goose should be sauce for the gander" to borrow one of the many sapient epigrams found in the opinions of the Circuit Court. *Remington Rand, Inc.* v. *Commissioner*, (C.C.A.) 33 Federal (2d) 77, certiorari denied in 280 U. S. 59[illegible], 50 Sup. Ct. 39, 74 L. Ed. 639. As to the rules being applicable only to the taxable year of 1929 and subsequent taxable years, there is nothing anomalous about that. It is customary to fix income tax liability along arbitrary lines. The Revenue Act of 1928, Section 2141 Title 26 U.S.C.A. Paragraph (a),* was designed to mark a new departure in consolidated returns and marks the beginning for the year of 1929 arbitrarily. The rate that corporations shall pay is arbitrarily fixed, as well as that of individuals. The Circuit Court said in its second opinion (R. 127):

> "At any rate, if Article 37 (b) is applicable the Commissioner must first determine and adjust the bases of the stock immediately prior to the sale. A strong burden was cast upon appellee to prove that the Commissioner erred in determining and adjusting the bases of the stock as required by Section 34. There is no finding by the trial court as to the ad-

*Paragraph (a): "An affiliated group of corporations shall, subject to the provisions of this section, have the privilege of making a consolidated return for the taxable year 1929 or any subsequent taxable year in lieu of separate returns."

justed bases of the stock, nor any conclusion that the commissioner erred in that regard. Without such proof, the commissioner's determination cannot be set aside."

The statement of the Circuit Court in this respect is not borne out by the record. The trial court determined the amount of capital investment which the petitioner made in the subsidiaries and the loss it suffered thereon (Finding of Fact No.'s 1, 2, and 3; R. 19, 20, 21).

So did the respondent commissioner. (See Petitioner's Exhibit "A"; R. 31).

The commissioner arbitrarily ruled as follows:

"However this is a 1929 transaction and by no stretch of the imagination can it be considered other than a winding up dissolution and as per article 37 (a) Regulations 75:

'Gain or loss shall not be recognized upon a distribution during a consolidated return period, by a member of an affiliated group to another member of such group, in cancellation or redemption of all or any portion of its stock; and any such distribution shall be considered an intercompany transaction.'

The facts established that the distribution and liquidation in question occurred during the consolidated period.

Article 40 (a) Regulations 75 also reads as follows:

'Intercompany accounts receivable or other obligations which are the result of intercompany

transactions during a consolidated return period shall not be deducted as bad debts during a consolidated return period.' "

It is manifest from this ruling of the commissioner that he did not consider the bases but relied entirely upon Article 37 (a) Regulations 75. He decided that the liquidating dividend paid over to the parent was an intercompany transaction. That this was the position of the commissioner is further evidenced by the Answer filed in the trial court (Subdivision 4, of Paragraph 4; R. 8) wherein the Commissioner in his Answer alleged:

"That the liquidation of the said Springer Trading Company and the said Roy Trading Company as alleged in the plaintiff's complaint, constituted distribution during a consolidated return period within the meaning of the provisions of Section 37, Article A of Regulations 75 quoted above; and that the same constituted an intercompany transaction for which no account or loss can be recognized."

The respondent bases his contention that subdivision (a) of Article 37 Regulations 75 is controlling because the record shows the stock was voted at a meeting held for the purpose of formally dissolving the subsidiaries on December 30, 1929 (R. 53). But the respondent found that the subsidiaries were liquidated and dissolved in November (R. 30) and the loss of the petitioner on its capital investment in the subsidiaries was charged off as of December 31, 1929 (R. 52). The undisputed evidence discloses that the payment of the

liquidating dividend was not in payment or cancellation of the subsidiaries' stock (R. 52) and the trial court so concluded (R. 24). The true intent and purpose of subdivision (a) Article 37 Regulations 75 is to forbid and prevent the cancellation or redemption of stock in subsidiaries at fictitious values to prevent the pyramiding of losses by cancelling or redeeming stock of subsidiaries at fictitious values. There can be no contention that any attempt was or is being made in the instant case to pyramid losses or take up stock at fictitious values.

SPECIFICATION OF ASSIGNED ERROR NO. II

The Circuit Court of Appeals erred in denying petitioner's loss which it suffered in the investment of its subsidiaries to-wit: The Springer Trading Company in the sum of $86,116.05 and the Roy Trading Company in the sum of $44,676.06 with interest; and in holding and finding such loss to be a double deduction.

The Court below based its decision on the ground that the Petitioner was seeking double deduction and claiming that it was lawfully entitled to a double deduction, solely by reason of the provisions of Regulations 75. The petitioner has contended in both the lower courts and now contends, that it is not seeking a double deduction. Manifestly, there was no actual return of the capital to the petitioner, nor was there the equivalent of such return in the amount of the operating losses. For example, under the consolidated returns for previous years, the Springer Trading Com-

pany's operating loss, as it appeared year by year, was taken into account but the inclusion of that loss in the yearly consolidated return did not reimburse the Charles Ilfeld Company for any part of the $109,030.27 capital investment made and the $86,116.05 lost in the operation of this subsidiary. The most that can be said is that the Charles Ilfeld Company benefited over the years of affiliation by having its own taxes reduced according to the rate charged, which varied almost every year. But there was not, under any conceivable theory, a return to the Charles Ilfeld Company, of even that amount on account of its investment. In order to determine the exact amount which the petitioner benefited by reason of offsetting the current annual operating losses of the subsidiaries against the current annual operating profits of the parent, it would be necessary to go back and determine the amount in dollars and cents so offset, multiplied by the varying rates fixed for corporations, for each particular year for the entire affiliated period. Had the subsidiary corporations earned the sum of $130,792.11 instead of losing it, such profit would, on liquidation in 1929, have been taxed the exact amount the surplus was thereby augmented, although during the period of making consolidated returns, it had been annually taxed on this same profit. *Remington Rand, Inc.* v. *Commissioner* 33 Federal (2d) 77, 280 U. S. 591, 50 Sup. Ct. 39, 74 L. Ed. 639. The Treasury Department, since the decision of the Circuit Court in this case, has accordingly

ruled and instructed collectors generally as follows: (Commerce Clearing House reports):

"Reference is made to the decision of the Circuit Court of Appeals, 10th Circuit, in the case of Hernandez v. Charles Ilfeld Company, decided July 13, 1933, C.C.H. 1933 Volume 3, page 9122, P.H. 1933 page 2193, paragraph 1512. A petition for rehearing of this case has been filed.

Inasmuch as that part of this decision which permits a deduction for a loss resulting from a liquidation of a subsidiary corporation is in conflict with the Bureau's interpretation of Article 37 (a) of Regulations 75, it is considered advisable, pending final settlement of this question, to adopt the policy of taxing gains, but not recognizing losses on such liquidations. Reports from your division should be prepared in accordance with this policy until the interpretation of Article 37 (a) is definitely determined."

There is no necessary correlation between the taxation of operating profits, or the deduction of operating losses by a corporation and the taxation of gains or the deduction of losses by a stockholder from his investment in it. Whether or not the corporation's gains or losses are reflected in the price the stockholder pays or receives for his stock, the income tax law treats the two taxpayers, the corporation and the stockholder, as entirely separate, and taxes their gains independently. Thus X Corporation may have had operating profits of $1,000,000, on all of which it has paid the tax. As a result of these profitable operations, the shares of stock in X owned by A may have advanced from their

cost of $100,000 to a market value of $200,000. If X corporation is liquidated and A receives $200,000 as his dividend, A will be compelled to pay an income tax on $100,000 profit, irrespective of the fact that the X corporation has previously paid a tax on these same profits as earned. This Court has held that this double taxation is not invalid, *Hellmich v. Hellman* (276 U. S., 233). The converse is also true. As was said in the case of *United Publishers Corporation* v. *Anderson* reported in 42 Federal (2d) p. 781:

> "In principle this case cannot be distinguished from Remington Rand, Inc. v. Commissioner of Internal Revenue (CCA) 33 Federal (2d) 77, certiorari denied 280 U. S. 591, 50 Sup. Ct. 39, 74 L. Ed. 639. It was there held that where a parent corporation sold its stockholdings in a subsidiary, the excess of the selling price over the cost of the stock was taxable as a profit realized by the parent. The fact that the parent had for several years filed consolidated returns was held immaterial, as was also the fact that the subsidiary had accumulated earnings during these years, which earnings had been included in the consolidated earnings and thus taxed. The Government's contention was upheld in both respects. Here we have the exact converse. Here the sale of the stock was at a loss, and the operations of the subsidiary had been conducted at a loss over the years when consolidated returns were filed. The taxpayer is therefore warranted in insisting: first, that upon the sale of the Journal of Commerce stock it suffered a loss of $161,091.85, to the same effect as upon the sale of any other property; and, second, that the fact that the Journal of Commerce Com-

pany's operating losses had been taken advantage of by the plaintiff in its payment of taxes on the consolidated basis is of no consequence."

The Tenth Circuit Court of Appeals disposes of this contention, in its original opinion (R. 118) by saying:

"The plaintiff argues that since in arriving at capital gain, operating profits which have been returned for taxes are not taken into the equation, operating losses which have been allowed as deductions should not be considered. There is some logic and convenience in a clear separation of capital losses from operating losses. There is rough equity in the plaintiff's position that what is sauce for the goose should be sauce for the gander.".

It is well established that the provisions authorizing consolidated returns do not change the substantive law to make the affiliated group into a single corporation. They authorize merely a form or method of reporting income. The affiliated corporations remain separate entities, but their respective incomes and deductions are reported on a single return. Thus it has been frequently held that the liability to pay the tax rests upon the several affiliated corporations individually. As the Supreme Court said in *Woolford Realty Company* v. *Rose* 286, U. S. 319:

". . . . The fact is not to be ignored that each of two or more corporations joining (under Sec. 240) in a consolidated return is none the less a taxpayer. Commissioner of Internal Revenue v. Ben Ginsberg Co. (C. C. A. 2d) 54 Fed. (2d) 238,239. By the express terms of the statute (Sec. 240 B) the tax when

computed is to be assessed, in the absence of agreement to the contrary, upon the respective affiliated corporations 'on the basis of the net income properly assignable to each.' 'The term "taxpayer" means any person subject to a tax, imposed by this Act.' Revenue Act of 1926, Sec. 2 a (9) (U.S.C.A. Title 26, Sec. 1262). A corporation does not cease to be such a person by affiliating with another." (at p. 328).

In the latter case, it was held that a parent corporation could not deduct on a consolidated return net losses of a subsidiary sustained before affiliation. Even, if the subsidiaries' losses were sustained during affiliation, it has been uniformly held, following the *Woolford* case, that the net losses cannot be applied against the income of the parent in a subsequent year. See: *Delaware & Hudson Co.* v. *Commr.* 65 Fed. (2d) 292. The two corporations are regarded as separate entities and the net loss of the one cannot be carried forward and applied against the income of the other in a later year.

Consequently, when deductions were taken in the consolidated return for the operating losses of two subsidiary corporations, the deductions belonged to those corporations and were taken by them. The parent corporation obtained a benefit from the loss, only by virtue of the statute, whereby the parent was permitted to offset the loss of another taxpayer against its own income. The parent suffered no loss of its own until it liquidated the two subsidiaries in 1929. In that year, it unquestionably did suffer a loss on its investment in the subsidiaries' stock. The fact that the sub-

sidiaries had previously had operating losses or had been permitted by Congress to report them in a consolidated return has no bearing upon the reality or the deductibility of the parent's own loss on its investment. This is well brought out in the recent case of *Burnet* v. *Imperial Elevator Company* 66 Federal (2d) 643. In that case, a subsidiary had had operating losses which were deducted on consolidated returns for prior years. In 1923, the subsidiary was liquidated, the parent receiving nothing on the liquidation. It, therefore, deducted the full cost of the stock in the subsidiary in that year, and sought to carry it forward as a net loss. The commissioner urged that the parent was attempting to obtain a double deduction. The Court held that the deduction was allowable, saying:

> "Operating losses of the subsidiary are, obviously different from losses on the stock held by the tax payer, and the Board expressly finds that no deduction was taken for the stock loss in that year."

In the instant case, both the trial court and the Commissioner expressly find that no deduction was taken for the capital losses.

The Circuit Court of Appeals for the Ninth Circuit had the questions here at issue before it, in the case of *McLaughlin* v. *Pacific Lumber Company*, 66 Federal (2d) 895, except that the 1928 Act and the rules promulgated thereunder were not involved. The government in that case contended:

1. "That the losses of a parent corporation in connection with the liquidation and dissolution of a

have justified the petitioner there in claiming the loss on dissolution to be cost less the value of assets taken over. But the fact remains that the petitioner there did not make such a claim in its petition, and did not urge it in argument. The point, therefore, was not in issue. Nor was it in issue in the case of *Burnet* v. *Aluminum Goods Mfg. Company*, supra, decided by this court. So neither of the last-mentioned cases are decisive of the issue discussed in this subdivision of our brief, nor was the statute of 1928 or the rules promulgated thereunder, there involved or considered.

CONCLUSION

The petitioner does not seek a double deduction as we have heretofore demonstrated. Had the petitioner's subsidiaries operated at a profit, and paid taxes on such profit annually during the consolidated return period, the petitioner would have again been compelled to pay a tax on liquidation, the converse is and ought, in equity and good conscience, to be true. The respondent held in the first instance and still insists, that the payment of the liquidating dividends after dissolution and affiliation broken, was an intercompany transaction. It has been the respondent's position at all times that we should be denied this deduction, because it is an intercompany transaction and the respondent's answer filed in the trial court so discloses. The opinion of the Circuit Court discloses that to have been the position of the respondent in that court and in his brief filed in opposition to the Writ of Certiorari in

this Court (at p. 6, under heading "Argument"), respondent said:

> "We submit that the Court below properly held that the petitioner was not entitled to deduct in 1929 any portion of the amount by which the cost of the stock and the advances to its subsidiaries exceeded the sums distributed although we believe the decision should have rested on the ground that under the commissioner's regulations no loss should be recognized upon the distribution by the subsidiaries."

Had the petitioner herein filed a separate return for itself and each of its subsidiaries in the year 1929, the parent corporation would have been entitled under any theory of the law, or departmental regulations, to the deduction here claimed.

It is therefore, respectfully submitted that under the Statute and under the regulations, no other result can be reached than a reversal of the Judgment of the Circuit Court and an affirmance of the decision of the trial court in favor of the taxpayer. It is earnestly represented, moreover, that the Courts should permit no shadow of doubt to fall upon the inviolability of the consolidated returns regulations—contractual in their effect as between government and taxpayer, legislative in their force upon both, and ever since their promulgation relied upon by affiliated groups of corporations throughout the land as stating the exact tax consequences of transactions which, without such assurances, they might not have undertaken.

It is therefore respectfully submitted that the judg-

ment of the Circuit Court should be reversed with directions to affirm the judgment of the District Court.

Respectfully submitted,

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Albuquerque, New Mexico,
Counsel for Petitioner.

APPENDIX

REVENUE ACT OF 1928, C. 852, 45 STAT. 791, 822, 831

SEC. 115. DISTRIBUTION BY CORPORATIONS.

* * * * * *

(c) *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. In the case of amounts distributed in partial liquidation (other than a distribution within the provisions of section 112 (h) of stock or securities in connection with a reorganization) the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits within the meaning of subsection (b) of this section for the purpose of determining the taxability of subsequent distributions by the corporation.

SEC. 141. CONSOLIDATED RETURNS OF CORPORATIONS—1929 AND SUBSEQUENT TAXABLE YEARS.

(a) *Privilege to file consolidated returns.*—An affiliated group of corporations shall, subject to the provisions of this section, have the privilege of making a consolidated return for the taxable year 1929 or any subsequent taxable year, in lieu of separate returns. The making of a consolidated return shall be upon the condition that all the corporations which have been members of the affiliated group at any time during the taxable year for which the return is made consent to

all the regulations under subsection (b) prescribed prior to the making of such return; and the making of a consolidated return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year the consolidated return shall include the income of such corporation for such part of the year as it is a member of the affiliated group.

(b) *Regulations.*—The Commissioner, with the approval of the Secretary, shall prescribe such regulations as he may deem necessary in order that the tax liability of an affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be determined, computed, assessed, collected, and adjusted in such manner as clearly to reflect the income and to prevent avoidance of tax liability.

(c) *Computation and payment of tax.*—In any case in which a consolidated return is made the tax shall be determined, computed, assessed, collected, and adjusted in accordance with the regulations under subsection (b) prescribed prior to the date on which such return is made. Only one specific credit, computed as provided in section 26 (b), shall be allowed in computing the tax.

TREASURY REGULATIONS 75, PROMULGATED UNDER THE REVENUE ACT OF 1928.

APPLICATION OF REGULATIONS

(a) 1929 and Subsequent Years.

These regulations are applicable only to the taxable year 1929 and to subsequent taxable years.

ART. 2.—*Definitions.*

* * * * *

(c) *Consolidated Return Period.*

The term "consolidated return period" means the taxable year 1929, or any subsequent taxable year, for which a consolidated return is made or is required.

ART. 34.—*Sale of Stock—Basis for determining Gain or Loss.*

(a) *Scope of Article.*

This article prescribes the basis for determining the gain or loss upon any sale or other disposition (hereinafter referred to as "sale") by a corporation which is (or has been) a member of an affiliated group which makes (or has made) a consolidated return for the taxable year 1929 or any subsequent taxable year, of any share of stock issued by another member of such group (whether issued before or during the period that it was a member of the group and whether issued before, during, or after the taxable year 1929), and held by the selling corporation during any part of a consolidated return period. (For the basis in the case of sales of bonds, see article 35.) The paragraphs of this article are applicable to sales during different periods of time, as follows:

(1) Sales which do not break the affiliation—paragraph (b);

(2) Sales which break the affiliation and which are made during the period that the selling corporation is a member of the affiliated group (whether or not during a consolidated return period)—paragraph (c);

(3) Sales made after the selling corporation has ceased to be a member of the affiliated group—paragraph (d).

(b) *Sales which do not Break Affiliation.*

If notwithstanding any such sale the issuing corporation remains a member of the affiliated group, such basis shall be determined and adjusted in the same

manner as if the selling corporation and the issuing corporation had never been members of an affiliated group. (See sections 111 to 115, inclusive, of the Act, and articles 561 to 629, inclusive, of Regulations 74.)

(c) *Sales which break Affiliation made while Selling Corporation is Member of Group.*

If the sale is made during a period which the selling corporation is a member of the affiliated group (whether or not during a consolidated return period), and if, as a result of such sale, the issuing corporation ceases to be a member of the affiliated group, such basis shall be determined as follows:

(1) The aggregate basis of all shares of stock of the issuing corporation held by each member of the group (exclusive of the issuing corporation) immediately prior to the sale, shall be determined separately for each member of the group, and adjusted in accordance with the Act (see sections 111 to 115, inclusive, of the Act, and articles 561 to 629, inclusive, of Regulations 74):

(2) From the sum of the aggregate bases, as determined in paragraph (1) above, there shall be deducted the aggregate of the losses of such issuing corporation sustained during each of the consolidated return periods (including only the taxable year 1929 and subsequent taxable years) after such corporation became a member of the group and prior to the sale of the stock, to the extent that such losses could not have been availed of by such corporation as a net loss in computing its tax for such periods if it had made a separate return for each of such periods;

(3) The total aggregate basis of all shares of stock, after making the deduction under paragraph (2), shall then be allocated to each member of the group which

holds stock in the issuing corporation, in the ratio that the basis of each, as determined under paragraph (1), is to the sum of the bases of all;

(4) The aggregate basis as determined under paragraph (3) for each member of the group shall then be equitably apportioned among the various classes of stock held by such member according to the circumstances of the case—ordinarily in the ratio that the basis of each class of stock held by it at the time of the sale is to the sum of the bases of each class of stock held by it;

(5) The basis of each share of stock of each class held by a member of the group shall then be determined by dividing the basis apportioned to such class under paragraph (4) by the total number of shares of such class held by it.

* * * * * *

(d))*Sales after Selling Corporation has ceased to be a Member of the Group.*

If the sale is made after the selling corporation has ceased to be a member of the affiliated group, such basis shall be determined in accordance with paragraph (c) of this article, except that—

(1) The aggregate basis (under subparagraph (1) of such paragraph) shall be determined for all shares of the issuing corporation held by each member of the group immediately prior to the time the selling corporation ceased to be a member of the group (rather than immediately prior to the sale); and

(2) The allocations (under subparagraph (3) of such article) shall be made to each member of the group which held stock of the issuing corporation immediately prior to the time the selling corporation ceased to be a member of the group (rather than to the

members holding such stock at the time of the sale); and

(3) The basis of each share of stock held by the selling corporation (determined, as above, as of the time the selling corporation ceased to be a member of the group) shall then be adjusted in accordance with the Act (see, particularly, sections 111 to 115, inclusive, of the Act and articles 561 to 629, inclusive, of Regulations 74) in order to determine the basis at the time of the sale.

(c) *Limitation on Adjustment For Losses.*

No deduction shall be made under paragraph (c) (2) of this article, in the event of a consolidated net loss which was sustained more than two years prior to the close of the taxable year during which the sale was made and which was not availed of by the members of the affiliated group in computing the tax for the consolidated return period, for that portion of such net loss which the losses of the subsidiary for the year in which such net loss was sustained bears to the aggregate losses of each of the members of the group.

ART. 35.—*Sale of Bonds—Basis for determining Gain or Loss.*

In the case of a sale or other disposition by a corporation, which is (or has been) a member of an affiliated group which makes (or has made) a consolidated return for the taxable year 1929 or any subsequent taxable year, of bonds issued by another member of such group (whether or not issued while it was a member of the group and whether issued before, during, or after the taxable year 1929), the basis of each bond, for determining the gain or loss upon such sale or other disposition, shall be determined in accordance

with the Act (see particularly, section 113 of the Act), but the amount of any loss otherwise allowable shall be decreased by the excess (if any) of the aggregate of the deductions computed under paragraph (c) (2) of article 34 over the aggregate of the basis of the stock of the issuing corporation as computed under paragraph (c) (1) or (d), as the case may be, held by the members of the affiliated group. (See, also, article 40 (c), relating to disallowance of loss upon intercompany bad debts.)

ART. 37.—*Dissolutions—Recognition of Gain or Loss.*

(a) *During Consolidated Return Period.*

Gain or loss shall not be recognized upon a distribution during a consolidated return period, by a member of an affiliated group to another member of such group, in cancellation or redemption of all or any portion of its stock; and any such distribution shall be considered an intercompany transaction.

(b) *After Consolidation Return Period.*

Any such distribution after a consolidated return period, whether in complete or partial liquidation, shall be treated as a sale of the stock, and the adjustments specified in articles 34 and 35 will be made, and article 36 will be applicable.

ART. 40.—*Bad Debts.*

(a) *Resulting From Transactions During Consolidated Return Period.*

Intercompany accounts receivable or other obligations which are the result of intercompany transactions during a consolidated return period shall not be.

[redacted]

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tion for a rehearing was filed August 10, 1933 (R 143–146), and was denied October 10, 1933 (R. 151). The petition for a writ of certiorari was filed November 10, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioner was affiliated with two subsidiary corporations by the ownership of all of such corporations' stock during the year 1929 and for some years prior thereto. During the year 1929, up to and including the month of November, 1929, the subsidiary corporations liquidated and sold all of their assets to outside interests and in December, 1929, turned over to the petitioner the cash proceeds realized from liquidation. Such cash proceeds were less in amount in each case than the cost of the subsidiary's stock to the petitioner, plus advances theretofore made by the petitioner to the subsidiary. During the period of affiliation the petitioner was enabled through the medium of consolidated returns to deduct from its income losses of the subsidiaries exceeding in amount the difference between the cost of the stock plus advances made and the amounts received on liquidation. Was the petitioner entitled to deduct any amounts from its income for 1929 as a result of the liquidation of the subsidiaries?

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and regulations involved will be found in the Appendix, *infra*, pp. 12–19.

STATEMENT

Petitioner brought this suit in the District Court for New Mexico for the recovery of income taxes paid for the year 1929. (R. 1–5.) Jury trial was waived in writing (R. 12) and the court made findings of fact and conclusions of law (R. 20–25). The findings may be summarized as follows:

The petitioner purchased all of the capital stock of the Springer Trading Company in 1917 and all of the capital stock of the Roy Trading Company in 1920 and operated both corporations as affiliated or subsidiary corporations from the dates of such purchases up to and including the month of November, 1929. During the years of such operation the petitioner filed affiliated returns and availed itself of the annual operating losses of the subsidiaries during the period of affiliation. (R. 20–21.)

The petitioner paid the sum of $40,000 for the Springer Trading Company stock and during the period from 1917 to 1929 advanced and loaned to the latter company the sum of $69,030.27. During the year 1929, up to and including the month of November, the Springer Trading Company liquidated and sold all of its assets to outside interests and paid off its obligations. In December, 1929, the Springer Trading Company turned over to the petitioner the cash proceeds derived from liquida-

tion in the sum of $22,914.22. The petitioner sustained a loss on its capital investment in the Springer Trading Company in the sum of $86,116.05, which was charged off the petitioner's books as a loss at the close of the year 1929. (R. 21.)

The petitioner paid the sum of $50,000 for the Roy Trading Company stock and during the period from 1920 to 1929 advanced and loaned the latter company the sum of $9,782.22. During the year 1929, up to and including the month of November, the Roy Trading Company liquidated and sold all of its assets to outside interests and paid all of its obligations. In December, 1929, the Roy Trading Company turned over to the petitioner the cash proceeds derived from liquidation in the sum of $15,106.16. The petitioner sustained a loss on its capital investment in the Roy Trading Company in the sum of $44,676.06 which was charged off the petitioner's books as a loss at the close of the year 1929. (R. 21–22.)

Both the Springer Trading Company and the Roy Trading Company were liquidated and dissolved in the month of November, 1929.[1] (R. 22.)

In the year 1930, the petitioner filed its consolidated return covering its operations and those of

[1] The finding that the two corporations were dissolved in November, 1929, is not sustained by the record. It does appear that the stock of both corporations was voted at stockholders meetings held on December 30, 1929, and that dissolution occurred on that date (R. 56–57). And see Record pp. 89, 135. This finding was assigned as error. (R. 126.)

the Roy Trading Company and the Springer Trading Company, without deducting the losses sustained by it on the liquidation and dissolution of the two subsidiaries, and paid to the Collector the sum of $20,836.20 in equal quarterly installments. (R. 22–23.) Thereafter, in May, 1931, the petitioner filed an amended return and claim for refund for the year 1929 setting up these losses as deductible. (R. 23.) The claim for refund was rejected by the Commissioner on January 28, 1932. (R. 23.)

The petitioner has claimed and been allowed, in the aggregate, as deductions from its own net income for the taxable years 1918 to 1928, inclusive, the total sum of $131,424.41, and charged with and taxed upon profits in the total sum of $12,913.88, or allowed aggregate net deductions from its own taxable net income of $118,510.53 on account of operating losses sustained by the Springer Trading Company. (R. 24.)

The petitioner has claimed and been allowed, in the aggregate, as deductions from its own net income for the taxable years from 1920 to 1929, inclusive, the total sum of $61,535.17, and charged with and taxed upon the profits in the total sum of $4,407.32, or allowed aggregate net deductions from its own taxable net income of $58,127.85 on account of operating losses sustained by the Roy Trading Company. (R. 24.)

The District Court rendered judgment for the petitioner in the sum of $14,460.43, with interest. (R. 25–26, 122–123.) The Circuit Court of Ap-

If, as the court below held, the case is one in which the parent's loss suffered in liquidation of the subsidiaries was recognizable, nevertheless as the court also held, the regulations do not contemplate that the petitioner was entitled to deduct its investment twice. Since, through the medium of consolidated returns in prior years, the petitioner had exercised the right to offset against its income losses of the subsidiaries exceeding in amount the capital loss now claimed, no deduction should be allowable for the year 1929. In promulgating Article 34 (*c*) (2) of Regulations 75 (*infra*, pp. 14, 15), upon which the petitioner relies, the Commissioner was evidently prescribing rules only with respect to 1929 and subsequent years. We do not believe either the statute or the regulations contemplated that a double deduction should be permitted where the losses occurred in years prior to 1929 when such deductions were denied in the case of losses occurring in 1929 and subsequent years. As the court below stated (R. 148), this would be an unjust and anomalous result not lightly to be attributed to the Treasury Department.

But if such is the result of the regulations, nevertheless we submit that the decision of the court below does not result in prejudicial error. While the court held that the capital loss was recognizable, we believe that its determination in this respect was contrary to the provisions of the regulations. In other words, since the record shows that on

December 30, 1929, the petitioner owned and voted the stock of its subsidiaries and certificates of suspension of business had not been filed by the subsidiaries prior to that date (R. 56–57), it is apparent that in November, 1929, when the distributions were made affiliation still existed between the petitioner and the liquidating corporations. Cf. *Barnet* v. *Aluminum Goods Co.*, 287 U.S. 544. Consequently, the distributions occurred during a consolidated return period and Articles 37 (a) and 40 (a) of Regulations 75 (*infra*, pp. 18, 19), are applicable. Under these provisions no gain or loss is recognizable since the transactions are considered intercompany in their nature.

We do not believe there is a direct conflict between the decision of the court below and those in the cases cited by the petitioner. (Br. 8–11.) All of those cases were decided under revenue acts prior to the Revenue Act of 1928. The decision below, as evidenced by the opinion denying the petition for rehearing, is predicated on the effect of Regulations 75 promulgated under the Revenue Act of 1928, legislative in character, and in this respect differing from those under prior acts. As the petitioner states (Br. 17), this is the first case presented to this Court for an interpretation of the 1928 Act and the rules promulgated thereunder touching consolidated returns. Consequently, a decision here would not necessarily resolve any conflicts existing under the provisions of the earlier acts.

If the question presented is the same under the Revenue Act of 1928 and Regulations 75 as under prior acts, nevertheless we believe the only decision directly in conflict is that of the District Court for the Southern District of New York in *United Publishers' Corp.* v. *Anderson,* 42 F. (2d) 781. In *McLaughlin* v. *Pacific Lumber Co.,* 66 F. (2d) 895 (C.C.A. 9th), the court did not specifically hold that prior years' losses taken as deductions by the parent should not be offset against a loss on liquidation, but stated that the collector had failed to establish any specific instance of a double deduction. While in *Burnet* v. *Imperial Elevator Co.,* 66 F. (2d) 643 (C.C.A. 8th), the court stated that operating losses of the subsidiary are different from losses on its stock, the court also pointed out that the stock loss suffered by the parent corporation for the fiscal year 1923 was more than sufficient to offset its income both for 1923 and 1925 and it was, therefore, immaterial whether an operating loss or a part of the capital loss was applied in 1923 against the petitioner's income. Two other Circuit Courts of Appeals have held under the law prior to the 1928 Act that losses deducted by the parent for prior years must be offset against a final capital loss. Cf. *Burnet* v. *Riggs Nat. Bank,* 57 F. (2d) 980 (C.C.A. 4th); *Commissioner* v. *Apartment Corp.,* 67 F. (2d) 3 (C.C.A. 4th). The same principle was suggested by this Court, although not necessary for the decision, in the case of *Burnet* v. *Aluminum Goods Co., supra.*

CONCLUSION

While the questions presented are probably important as an administrative matter for prior years as well as for the year 1929 and subsequent years, nevertheless in the absence of a direct conflict between the decision here and those in other Circuit Courts of Appeals, and because we believe the decision below is correct, we oppose the petition in this case.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

SEWALL KEY,
NORMAN D. KELLER,
Special Assistants to the Attorney General.

DECEMBER, 1933.

APPENDIX

REVENUE ACT OF 1928, C. 852, 45 STAT. 791, 822, 831

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

* * * * * *

(c) *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. In the case of amounts distributed in partial liquidation (other than a distribution within the provisions of section 112 (h) of stock or securities in connection with a reorganization) the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits within the meaning of subsection (b) of this section for the purpose of determining the taxability of subsequent distributions by the corporation.

SEC. 141. CONSOLIDATED RETURNS OF CORPORATIONS—1929 AND SUBSEQUENT TAXABLE YEARS.

(a) *Privilege to file consolidated returns.*—An affiliated group of corporations shall, subject to the provisions of this section, have the privilege of making a consolidated return for the taxable year

1929 or any subsequent taxable year, in lieu of separate returns. The making of a consolidated return shall be upon the condition that all the corporations which have been members of the affiliated group at any time during the taxable year for which the return is made consent to all the regulations under subsection (b) prescribed prior to the making of such return; and the making of a consolidated return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year the consolidated return shall include the income of such corporation for such part of the year as it is a member of the affiliated group.

(b) *Regulations.*—The Commissioner, with the approval of the Secretary, shall prescribe such regulations as he may deem necessary in order that the tax liability of an affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be determined, computed, assessed, collected, and adjusted in such manner as clearly to reflect the income and to prevent avoidance of tax liability.

(c) *Computation and payment of tax.*—In any case in which a consolidated return is made the tax shall be determined, computed, assessed, collected, and adjusted in accordance with the regulations under subsection (b) prescribed prior to the date on which such return is made. Only one specific credit, computed as provided in section 26 (b), shall be allowed in computing the tax.

TREASURY REGULATIONS 75, PROMULGATED UNDER THE REVENUE ACT OF 1928

APPLICATION OF REGULATIONS

(a) *1929 and Subsequent Years.*

These regulations are applicable only to the taxable year 1929 and to subsequent taxable years.

ART. 2.—*Definitions.*

* * * * *

(c) *Consolidated Return Period.*

The term "consolidated return period" means the taxable year 1929, or any subsequent taxable year, for which a consolidated return is made or is required.

ART. 34.—*Sale of Stock—Basis for determining Gain or Loss.*

(a) *Scope of Article.*

This article prescribes the basis for determining the gain or loss upon any sale or other disposition (hereinafter referred to as "sale") by a corporation which is (or has been) a member of an affiliated group which makes (or has made) a consolidated return for the taxable year 1929 or any subsequent taxable year, of any share of stock issued by another member of such group (whether issued before or during the period that it was a member of the group and whether issued before, during, or after the taxable year 1929), and held by the selling corporation during any part of a consolidated return period. (For the basis in the case of sales of bonds, see article 35.) The paragraphs of this article are applicable to sales during different periods of time, as follows:

(1) Sales which do not break the affiliation—paragraph (b);

(2) Sales which break the affiliation and which are made during the period that the selling corporation is a member of the affiliated group (whether or not during a consolidated return period)—paragraph (c);

(3) Sales made after the selling corporation has ceased to be a member of the affiliated group—paragraph (d).

(b) *Sales which do not Break Affiliation.*

If notwithstanding any such sale the issuing corporation remains a member of the affiliated group, such basis shall be determined and adjusted in the same manner as if the selling corporation and the issuing corporation had never been members of an affiliated group. (See sections 111 to 115, inclusive, of the Act, and articles 561 to 629, inclusive, of Regulations 74.)

(c) *Sales which break Affiliation made while Selling Corporation is Member of Group.*

If the sale is made during a period which the selling corporation is a member of the affiliated group (whether or not during a consolidated return period), and if, as a result of such sale, the issuing corporation ceases to be a member of the affiliated group, such basis shall be determined as follows:

(1) The aggregate basis of all shares of stock of the issuing corporation held by each member of the group (exclusive of the issuing corporation) immediately prior to the sale, shall be determined separately for each member of the group, and adjusted in accordance with the Act (see sections 111 to 115, inclusive, of the Act, and articles 561 to 629, inclusive, of Regulations 74);

(2) From the sum of the aggregate bases, as determined in paragraph (1) above, there shall be

deducted the aggregate of the losses of such issuing corporation sustained during each of the consolidated return periods (including only the taxable year 1929 and subsequent taxable years) after such corporation became a member of the group and prior to the sale of the stock, to the extent that such losses could not have been availed of by such corporation as a net loss in computing its tax for such periods if it had made a separate return for each of such periods;

(3) The total aggregate basis of all shares of stock, after making the deduction under paragraph (2), shall then be allocated to each member of the group which holds stock in the issuing corporation, in the ratio that the basis of each, as determined under paragraph (1), is to the sum of the bases of all;

(4) The aggregate basis as determined under paragraph (3) for each member of the group shall then be equitably apportioned among the various classes of stock held by such member, according to the circumstances of the case—ordinarily in the ratio that the basis of each class of stock held by it at the time of the sale is to the sum of the bases of each class of stock held by it;

(5) The basis of each share of stock of each class held by a member of the group shall then be determined by dividing the basis apportioned to such class under paragraph (4) by the total number of shares of such class held by it.

* * * * *

(d) *Sales after Selling Corporation has ceased to be a Member of the Group.*

If the sale is made after the selling corporation has ceased to be a member of the affiliated group,

such basis shall be determined in accordance with paragraph (c) of this article, except that—

(1) The aggregate basis (under subparagraph (1) of such paragraph) shall be determined for all shares of the issuing corporation held by each member of the group immediately prior to the time the selling corporation ceased to be a member of the group (rather than immediately prior to the sale); and

(2) The allocations (under subparagraph (3) of such article) shall be made to each member of the group which held stock of the issuing corporation immediately prior to the time the selling corporation ceased to be a member of the group (rather than to the members holding such stock at the time of the sale); and

(3) The basis of each share of stock held by the selling corporation (determined, as above, as of the time the selling corporation ceased to be a member of the group) shall then be adjusted in accordance with the Act (see, particularly, sections 111 to 115, inclusive, of the Act and articles 561 to 629, inclusive, of Regulations 74) in order to determine the basis at the time of the sale.

(e) *Limitation on Adjustment For Losses.*

No deduction shall be made under paragraph (c) (2) of this article, in the event of a consolidated net loss which was sustained more than two years prior to the close of the taxable year during which the sale was made and which was not availed of by the members of the affiliated group in computing the tax for the consolidated return period, for that portion of such net loss which the losses of the subsidiary for the year in which such net loss was sus-

tained bears to the aggregate losses of each of the members of the group.

* * * * *

ART. 35.—*Sale of Bonds—Basis for determining Gain or Loss.*

In the case of a sale or other disposition by a corporation, which is (or has been) a member of an affiliated group which makes (or has made) a consolidated return for the taxable year 1929 or any subsequent taxable year, of bonds issued by another member of such group (whether or not issued while it was a member of the group and whether issued before, during, or after the taxable year 1929), the basis of each bond, for determining the gain or loss upon such sale or other disposition, shall be determined in accordance with the Act (see, particularly, section 113 of the Act), but the amount of any loss otherwise allowable shall be decreased by the excess (if any) of the aggregate of the deductions computed under paragraph (c) (2) of Article 34 over the aggregate of the basis of the stock of the issuing corporation as computed under paragraph (c) (1) or (d), as the case may be, held by the members of the affiliated group. (See, also, Article 40 (c), relating to disallowance of loss upon intercompany bad debts.)

ART. 37.—*Dissolutions—Recognition of Gain or Loss.*

(a) *During Consolidated Return Period.*

Gain or loss shall not be recognized upon a distribution during a consolidated return period, by a member of an affiliated group to another member of such group, in cancellation or redemption of all or any portion of its stock; and any such distribution shall be considered an intercompany transaction.

(b) *After Consolidated Return Period.*

Any such distribution after a consolidated return period, whether in complete or partial liquidation, shall be treated as a sale of the stock, and the adjustments specified in articles 34 and 35 will be made, and article 36 will be applicable.

ART. 40.—*Bad Debts.*

(a) *Resulting From Transactions During Consolidated Return Period.*

Intercompany accounts receivable or other obligations which are the result of intercompany transactions during a consolidated return period shall not be deducted as bad debts during a consolidated return period.

* * * * *

(e) *Limitation on Allowance after Consolidated Return Period.*

The rules applicable to the allowance of losses upon the sale of bonds shall be applicable to the allowance after the consolidated return period as a bad debt of an intercompany account receivable or other obligation resulting from an intercompany transaction during the consolidated return period. (See article 35.)

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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 579

CHARLES ILFELD COMPANY, PETITIONER

v.

B. C. HERNANDEZ, COLLECTOR OF INTERNAL REVENUE for the District of New Mexico

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

No written opinion was rendered by the District Court. Its findings of fact and conclusions of law appear at R. 19–24. The original opinion of the Circuit Court of Appeals (R. 111–120) is reported in 66 F. (2d) 236. An opinion rendered on a petition for rehearing (R. 124–129) is reported in 67 F. (2d) 236.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 13, 1933. (R. 120–121.) A peti-

tion for a rehearing was filed August 10, 1933 (R. 121–124), and was denied October 10, 1933 (R. 129). The petition for a writ of certiorari was filed November 10, 1933, and was granted December 18, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioner was affiliated with two subsidiary corporations through ownership of all of such corporations' stock during the year 1929 and for some years prior thereto. During the year 1929, up to and including the month of November, 1929, the subsidiary corporations liquidated and sold all of their assets to outside interests and in December, 1929, turned over to the petitioner the cash proceeds realized from liquidation. Such cash proceeds were less in amount in each case than the cost of the subsidiary's stock to the petitioner, plus advances theretofore made by the petitioner to the subsidiary. During the period of affiliation the petitioner was enabled through the medium of consolidated returns to deduct from its income losses of the subsidiaries exceeding in amount the difference between the cost of the stock plus advances made and the amounts received on liquidation. Was the petitioner entitled to deduct any amounts from its income for 1929 as a result of the liquidation of the subsidiaries?

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and regulations involved will be found in Appendix A, *infra*, pp. 28–37.

STATEMENT

The petitioner brought this suit in the District Court for New Mexico for the recovery of income taxes paid for the year 1929. (R. 1–4.) Jury trial was waived in writing (R. 11) and the court made findings of fact and conclusions of law (R. 19–24). The facts found may be summarized as follows:

The petitioner purchased all of the capital stock of the Springer Trading Company in 1917 and all of the capital stock of the Roy Trading Company in 1920 and operated both corporations as affiliated or subsidiary corporations from the dates of such purchases up to and including the month of November, 1929. During the years of such operation the petitioner filed consolidated returns and availed itself of the annual operating losses of the subsidiaries during the period of affiliation. (R. 19–20.)

The petitioner paid the sum of $40,000 for the Springer Trading Company stock and during the period from 1917 to 1929 advanced and loaned to the latter company the sum of $69,030.27. During the year 1929, up to and including the month of November, the Springer Trading Company liquidated and sold all of its assets to outside interests and paid all of its obligations. In December, 1929, the

Springer Trading Company turned over to the petitioner the cash proceeds derived from liquidation in the sum of $22,914.22. The petitioner sustained a loss on its capital investment in the Springer Trading Company in the sum of $86,116.05, which was charged off the petitioner's books as a loss at the close of the year 1929. (R. 20–21.)

The petitioner paid the sum of $50,000 for the Roy Trading Company stock and during the period from 1920 to 1929 advanced and loaned the latter company the sum of $9,782.22. During the year 1929, up to and including the month of November, the Roy Trading Company liquidated and sold all of its assets to outside interests and paid all of its obligations. In December, 1929, the Roy Trading Company turned over to the petitioner the cash proceeds derived from liquidation in the sum of $15,106.16. The petitioner sustained a loss on its capital investment in the Roy Trading Company in the sum of $44,676.06, which was charged off the petitioner's books as a loss at the close of the year 1929. (R. 21.)

Both the Springer Trading Company and the Roy Trading Company were liquidated and dissolved in the month of November, 1929.[1] (R. 21.)

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[1] The conclusion that the two corporations were dissolved in November, 1929, is not sustained by the record, unless by "dissolved" it is meant that the proceedings directed toward dissolution were initiated in November, 1929. The testimony at R. 52, relied on by the petitioner (Br. 3), must be read in connection with the immediately following testimony

The petitioner has claimed and been allowed, in the aggregate, as deductions from its own net income for the taxable years 1918 to 1928, inclusive, the total sum of $131,424.41, and charged with and taxed upon profits in the total sum of $12,913.88, or allowed aggregate net deductions from its own taxable net income of $118,510.53 on account of operating losses sustained by the Springer Trading Company. (R. 23.)

The petitioner has claimed and been allowed, in the aggregate, as deductions from its own net income for the taxable years from 1920 to 1929, inclusive, the total sum of $61,535.17, and charged with and taxed upon the profits in the total sum of $4,407.32, or allowed aggregate net deductions from its own taxable net income of $58,127.85 on account of operating losses sustained by the Roy Trading Company. (R. 23–24.)

In the year 1930, the petitioner filed its consolidated return covering its operations and those of the Roy Trading Company and the Springer Trading Company, without deducting the losses sustained by it on the liquidation and dissolution of the two subsidiaries, and paid to the Collector the

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of the same witness, which shows that the stock of both corporations was voted at stockholders' meeting held on December 30, 1929, and that dissolution occurred on that date. (R. 53–54.) See also the statement on the taxpayer's original return. (R. 72.) This finding of the District Court was assigned as error (R. 106), and this assignment was apparently sustained by the Circuit Court of Appeals. See R. 113.

sum of $20,836.20 in equal quarterly installments. (R. 22.) Thereafter, in May, 1931, the petitioner filed an amended return and claim for refund for the year 1929, setting up these losses as deductible. (R. 22.) The claim for refund was rejected by the Commissioner on January 28, 1932. (R. 22.)

The District Court rendered judgment for the petitioner for $14,460.43, with interest. (R. 25, 103.) The Circuit Court of Appeals held that capital losses resulting from the liquidation of the subsidiaries were items properly entering into the petitioner's return but that the loss already allowed having been in excess of the total losses sustained by reason of the purchase, operation, and liquidation of the subsidiaries, the judgment should have been for the respondent. (R. 111–120.) The court therefore reversed the judgment of the District Court but remanded the case for a new trial. (R. 120–121.) The petitioner thereupon filed a petition for rehearing contending that the case was ruled by the provisions of Treasury Regulations 75 applicable to 1929 and subsequent years. The Circuit Court of Appeals denied the petition and filed an opinion holding that the provisions of the regulations permitted the petitioner as parent to deduct losses realized on the winding up of the subsidiaries but neither the statute nor the regulations contemplated that the deduction should be taken twice. (R. 124–129.)

SUMMARY OF ARGUMENT

I

The petitioner is not entitled to deduct as a loss any portion of the amount by which the cost of its subsidiaries' stock and the advances to the subsidiaries exceeded the amounts received on liquidation, since under Regulations 75, which are applicable to the taxable year involved, the distributions to the petitioner constituted intercompany transactions upon which no gain or loss is recognized. The Commissioner originally took this position under Revenue Acts applicable to 1928 and prior years but later reversed it for such years, following this Court's decision in *Burnet* v. *Aluminum Goods Manufacturing Co.*, 287 U.S. 544.

For 1929 and subsequent years Congress granted to the Commissioner, with the approval of the Secretary, the power to prescribe regulations for the determination of the tax liability of an affiliated group in such manner as clearly to reflect the income and to prevent avoidance of tax liability, including the right to determine the extent to which gain or loss should be recognized upon the dissolution of a member of the group. Pursuant to this grant of power the Commissioner provided in Articles 37 (a) and 40 (a) of Regulations 75 (*infra*, p. 36) that gain or loss should not be recognized upon a distribution by an affiliate during a consolidated return period in cancellation or redemption

of all or any portion of its stock and that intercompany obligations should not be deducted as bad debts during a consolidated return period. The distribution in this case was made before affiliation ceased and was during a consolidated return period within the meaning of Regulations 75. Consequently no loss should be recognized.

These regulations control the question since they have the force and effect of law. They were properly made pursuant to express Congressional authority. They refuse to recognize gains equally with losses. Moreover, the petitioner and its affiliates had the right to elect whether or not they should file a consolidated return. By filing such return they accepted and were bound by the provisions of the regulations.

II

Even if the losses on liquidation are recognizable, the petitioner is not entitled to recover, since, as the court below held, it has received deductions from its income in previous years on account of losses of the subsidiaries exceeding in amount the losses now claimed. Through the medium of consolidated returns for prior years, the petitioner was enabled to deduct more than the actual loss on its whole investment. The operating losses of the subsidiaries in prior years were reflected in the eventual loss in the value of their stock and their accounts payable. While the statute provides generally for the deduction of losses incurred, neither

statute nor equitable principles of accounting contemplate that a loss may be deducted twice. The principle is applicable to the investment in the subsidiaries' stock as well as to the advances made.

The provisions of Articles 37 (b) and 34 (c) (2) of Regulations 75 (*infra*, pp. 36, 33) are not applicable here. They refer to a distribution after a consolidated return period and were not intended to apply to distributions such as those in this case, occurring while the corporations were still in existence and affiliated. But even if Article 34 (c) (2) could be held to apply, it is evident that there the Commissioner was only ruling with respect to the application of losses for 1929 and subsequent years. Regulations 75 were so limited. In prescribing regulations binding a taxpayer upon acceptance of their terms, there was no intention to restrict the taxpayer's right to raise a question of prior years' losses, not at that time authoritatively decided.

ARGUMENT

We contend that the deductions sought by the petitioner should not be allowed for two reasons: (1) Because the regulations applicable to the year involved, prescribed pursuant to express legislative authority, prohibit the recognition of such losses on liquidation, and (2) even if the losses are not prohibited altogether, they must be offset by deductions theretofore allowed the petitioner on account of operating losses of the subsidiaries which in this case exceeded the final losses claimed.

I

UNDER REGULATIONS 75, APPLICABLE TO THE TAXABLE YEAR 1929, THE DISTRIBUTIONS BY THE PETITIONER'S AFFILIATES CONSTITUTED INTERCOMPANY TRANSACTIONS UPON WHICH NO LOSS IS RECOGNIZED

The question whether in 1928 and prior years a parent corporation upon liquidation of a subsidiary was entitled to deduct as losses the cost of a subsidiary's stock, or the amount of advances and loans to the subsidiary, was productive of considerable litigation prior to the decision of this Court in *Burnet* v. *Aluminum Goods Manufacturing Co.*, 287 U.S. 544. While neither the statute nor the regulations were specific on the subject, the Commissioner took the position that the liquidation of a subsidiary constituted an intercompany transaction upon which no gain or loss should be recognized. Sol. Op. 131, I–1 Cumulative Bulletin 18, 23; G.C.M. 1501, VI–1 Cumulative Bulletin 260; G.C.M. 2774, VII–1 Cumulative Bulletin 196. The Board of Tax Appeals sustained this position in several cases and also held that gains as well as losses should not be recognized. *Appeal of United States Trust Co.*, 1 B.T.A. 901; *Mackechnie Bread Co.* v. *Commissioner*, 5 B.T.A. 883; *Wilmington Steamboat Co.* v. *Commissioner*, 9 B.T.A. 704; *Lau Co.* v. *Commissioner*, 15 B.T.A. 1064; and see *Utica Knitting Co.* v. *United States*, 68 C.Cls. 77, certiorari denied, 281 U.S. 739. Following the decision of this Court in the *Aluminum Goods Manufacturing Co.* case the administrative position was

changed and it was determined that losses as well as gains resulting from the liquidation of a subsidiary were to be recognized for 1928 and previous years. G.C.M. 11676, XII–1 Cumulative Bulletin 75.

The year 1929 marked a departure in the method of treatment of consolidated returns from that previously observed for 1928 and prior years. The Revenue Acts prior to that time had provided for such returns with a general power given to the Commissioner with the approval of the Secretary to prescribe regulations with respect thereto. Cf. Revenue Act of 1928, Section 142; Revenue Act of 1926, Section 240 (a). The Revenue Bill of 1928, as originally passed by the House, contained no provisions for consolidated returns for 1929 and subsequent years. This privilege was restored by the Senate but with the further provision that the Commissioner, with the approval of the Secretary, should have the power to prescribe such regulations as he might deem necessary in order that the tax liability of an affiliated group of corporations, making a consolidated return, might be determined, computed, assessed, collected, and adjusted in such manner as clearly to reflect the income and to prevent avoidance of tax liability. See S.Rep. No. 960, 70th Cong., 1st Sess., pp. 13–15.

It was further provided that the privilege of making a consolidated return should be upon the condition that all the corporations which were members of the affiliated group consent to all the regu-

lations so prescribed and that the making of a consolidated return should be considered as such consent. The House accepted the provisions inserted by the Senate (H.Rep. No. 1882, 70th Cong., 1st Sess., pp. 16–17), and they were enacted as Section 141 (a) and (b) of the Revenue Act of 1928 (*infra* pp. 28–29). The provisions with respect to the regulations were inserted in order to give the Commissioner the power to prescribe definite rules resolving many difficult problems arising in the administration of the provisions relative to consolidated returns. It was expected that the Commissioner would prescribe, among other things, the extent to which gain or loss should be recognized upon the dissolution of a member of the affiliated group.[2]

Pursuant to the authority so granted by Congress, the Commissioner with the approval of the Secretary promulgated Regulations 75, applicable to the year 1929 and subsequent years. The respondent, of course, agrees with the petitioner's

[2] The purpose of Congress in enacting Section 141 of the Revenue Act of 1928 is shown by the Senate Finance Committee Report, which states in part (S.Rep. No. 960, 70th Cong., 1st Sess., p. 15):

"Many difficult and complicated problems, however, have arisen in the administration of the provisions permitting the filing of consolidated returns. It is, obviously, of utmost importance that these questions be answered with certainty and a definite rule be prescribed. Frequently, the particular policy is comparatively immaterial, so long as the rule to be applied is known. The committee believes it to be impracticable to attempt by legislation to prescribe the various detailed and complicated rules necessary to meet the many differing and complicated situations. Accordingly, it has

contention that these Regulations are applicable, and are binding on the Government as well as the taxpayer. Our contention is that they in terms forbid recognition of the loss in this case. Article 37 (a) of the Regulations (*infra*, p. 36) provides that a distribution during a consolidated return period by one affiliate to another in cancellation or redemption of all or any portion of its stock shall be considered an intercompany transaction upon which gain or loss shall not be recognized. Article 40 (a) (*infra*, p. 36) provides that intercompany obligations which are the result of intercompany transactions during a consolidated return period shall not be deducted as bad debts during a consolidated return period. We submit that these two articles are directly applicable and prevent the allowance sought since the losses occurred during a consolidated return period.

The distributions were made to the petitioner on December 23, 1929. (R. 20, 21, 51.) While the District Court found that at that time the subsidiaries had suspended business and had ceased to function, the evidence shows beyond dispute that

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found it necessary to delegate power to the commissioner to prescribe regulations legislative in character covering them. * * *

"Among the regulations which it is expected that the commissioner will prescribe are: (1) The extent to which gain or loss shall be recognized upon the sale by a member of the affiliated group of stock issued by any other member of the affiliated group or upon the dissolution (whether partial or complete) of a member of the group; * * *."

See also H.Rep. No. 1882, 70th Cong., 1st Sess., pp. 16–17.

they remained in existence and undissolved, at least until December 30, 1929, upon which date the stockholders of the two companies authorized the filing of certificates of suspension of business with the State Corporation Commission of New Mexico. (R. 53–54.) On the latter date the petitioner still owned its stock in the subsidiaries. (R. 53.)[3] Consequently, affiliation continued, at least until December 30, 1929. This Court has expressly held that corporations have not ceased to be affiliated, "merely because, without change of corporate control, one of them was being liquidated." *Burnet* v. *Aluminum Goods Manufacturing Co., supra,* p. 548.

It appears from the terms of Article 37 (a) that it applies to every case in which at the time of distribution the requisite percentage of stock is held by the parent corporation. Any other construction would deprive of effect that portion of the article which provides that gain or loss shall not be recognized upon a distribution in redemption or cancellation of *all* of the stock. To hold that distribution in this case was not during a consolidated return period would overlook any distinction between Article 37 (a) and Article 37 (b) (*infra,* p. 36). The former refers to dissolutions which for all practical purposes are concurrent with cessation of affiliation caused by the dissolution and the events

[3] Findings as to these undisputed facts were requested from the District Court and refused. (R. 15–16.) An exception was taken to this refusal (R. 17), and it was assigned as error. (R. 106.) See note 1, p. 4, *supra.*

leading up thereto, while the latter provision refers to those dissolutions or distributions occurring after the affiliated group is no longer filing consolidated returns or after the subsidiary has ceased to be a member of the group although the former parent continues to own some part of the stock.

The Circuit Court of Appeals did not decide whether the distributions occurred during a consolidated return period within the meaning of Articles 37 (a) and 40 (a) of the Regulations, but held that even if within the period, the losses must nevertheless be recognized.[4] While that court decided this

[4] The court's treatment of this point in its opinion on rehearing (R. 127–129) seems to be based solely upon an article by the Secretary of the Treasury which the court believed evidenced the fact that the Treasury Department construed the Regulations as permitting apparent deductions realized on the winding up of a subsidiary. We submit that, on the contrary, this article shows that the Regulations intended to eliminate all liquidating gains or losses where the liquidation occurred at the time affiliation was in effect. The material portion of the article referred to is printed in Appendix B, *infra*, pp. 38–39. It shows that due to the impossibility as a practical matter of prescribing rules which would distinguish those types of dissolution upon which gain or loss should be recognized from those in which gain or loss should not be recognized, it was concluded, in the interest of certainty as to the rule to be applied, to treat all dissolutions as intercompany transactions. The article in question, written by the Secretary of the Treasury who approved the Regulations, merely serves to affirm the clear intent embodied therein to recognize neither gain nor loss upon liquidation of a subsidiary.

particular point against the respondent, it is open for consideration here in support of the judgment below. *Langnes* v. *Green*, 282 U.S. 531, 535–538; *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555, 560. We submit that the plain terms of Articles 37 (a) and 40 (a) of the Regulations show that they are applicable, and that the court below was in error in holding that under them the losses in question may be recognized.

In providing that gain or loss upon liquidation of a subsidiary shall not be recognized, Articles 37 (a) and 40 (a) of the Regulations are reasonably adapted to carry out the purpose of clearly reflecting income and preventing the avoidance of tax liability. Insofar as advances are concerned, this effect is plain. Advances in their very nature are intercompany transactions representing the lending of money by one branch of the business to another for operating purposes. In such case the loss to the group as a whole has not occurred when the obligation to repay the amount became worthless but at some prior time when the money borrowed was lost in operations. Such a loss has usually been reflected by way of deduction either against the income of a successful member of the group or against that of the borrower by carrying it forward under the authority of the net loss provisions of the statutes. To allow the loss on liquidation will frequently result in a duplication of deduction.

An example will show the extent to which such an allowance might possibly be taken. Corporations A, B, C and D are affiliated. In 1928 A loans $4,000 to B, B loans the same $4,000 to C, and C loans the same money to D to cover a current operating loss. The affiliated group takes a deduction for D's operating loss in 1928. In 1929 D becomes insolvent and C charges off the debt as worthless. In 1930 C becomes insolvent and B charges off the debt as worthless. In 1931 B becomes insolvent and A gets a deduction for a bad debt. Under such circumstances A, having income in excess of its subsidiaries' losses for each of the years, would have benefited four times on account of the one ultimate loss.

Similarly, the investment in the subsidiary by the purchase of its stock may frequently be the subject of duplicate deductions if the deduction is allowed when the subsidiary is liquidated. As a result of purchasing the stock the parent acquires the subsidiary and its assets and operates the subsidiary as a branch. The cost of these assets, gradually dissipated through operations, will have been represented by deductions taken by the affiliated group in prior years. To allow their deduction again as capital losses or worthless debts would be to distort the income and to permit, rather than to prevent, the avoidance of tax liability.

In the *Aluminum Goods* case this Court stated that no method of calculating income upon a consolidated return can be upheld (for 1928 and prior

years) which would deny all deductions for losses and at the same time would not further the purpose of preventing a distortion of the income of the unitary business. In that case it was apparent that prior years' losses of the subsidiaries had never been allowed as deductions. Here, as we contend under Point II (*infra*, pp. 18–27), such deductions had been allowed and a distortion would result from a second allowance. Accordingly, this is not a case in which the Regulations impose a burden upon the taxpayer. But even in cases where a burden results in the sense that a loss otherwise allowable is not granted, it is only because the affiliated group has taken advantage of the privilege of filing a consolidated return. This privilege confers material benefits not granted upon the filing of separate returns, in particular, the right to offset against the income of one member of the group the losses of another. Having availed itself of the privilege granted, the group should not be allowed to complain of the conditions annexed to the grant. *Grand Rapids & Indiana Ry. Co. v. Osborn*, 193 U.S. 17, 29.

II

NO DEDUCTIONS CAN BE ALLOWED IN ANY EVENT SINCE THE PETITIONER, THROUGH THE MEDIUM OF CONSOLIDATED RETURNS IN PRIOR YEARS, RECEIVED DEDUCTIONS FOR LOSSES OF ITS SUBSIDIARIES EXCEEDING IN AMOUNT THOSE NOW CLAIMED

The petitioner contends that Articles 37 (b), 40 (c), and 34 (c) (2) of Regulations 75 (*infra*,

pp. 36, 37, 33), are applicable to this case; that under the provisions of Article 34 (c) (2), the Commissioner has provided that only losses of a subsidiary for 1929 and subsequent years should be offset against the parent's loss and that prior years' losses should be disregarded. Article 34 (c) (2) is by its terms applicable only in the case of *sale* of the stock or in the situations embraced within Articles 37 (b) or 40 (c). It does not apply and was not intended to apply to distributions occurring during a consolidated return period.

As we have contended under Point I, *supra*, the distributions here occurred during a consolidated return period and are governed by the provisions of Articles 37 (a) and 40 (a) of the Regulations (*infra*, p. 36). These two articles contain no reference to Article 34 (c) (2) and the latter article has no application to the facts in this case. The court below did not hold that Articles 37 (b) and 34 (c) (2) applied, but stated (R. 126–127) that even if it be assumed that they governed the case the petitioner had failed to show that the Commissioner's determination was erroneous.

Even if our previous contention is wrong, and Article 34 (c) (2) should be held to apply, the fact that it prescribes that there should be deducted from the basis of the stock, the aggregate of the subsidiary's losses "sustained during each of the consolidated return periods (including only the taxable year 1929 and subsequent taxable years) after such corporation became a member of the

group" does not demonstrate that losses prior to 1929 should not also be deducted from the basis. Article 34 (c) (2) is only a part of the whole scheme for determining losses in such a case.

Article 34 (c) in its entirety furnishes the rules for the computation of gain or loss in cases of sales of stock which break affiliation and, by reference, in cases coming within the provisions of Articles 37 (b) and 40 (c). Subdivision (1) of Article 34 (c) provides that the basis must first be adjusted under Sections 111 to 115, inclusive, of the Revenue Act of 1928, before making the adjustments prescribed in subdivision (2) of Article 34 (c). When Article 34 is examined as a whole, it is plain that Article 34 (c) (2) does not come into operation until after Article 34 (c) (1) has been applied.

The Regulations were drafted in this manner in order to avoid discrimination. Some affiliated groups which had filed consolidated returns prior to 1929 might not be willing to subscribe to the new Regulations and would not consent to be governed by them. If the parent of such a group filed a separate return and sold a subsidiary's stock in 1929, Regulations 75 would not apply and the adjustment of its basis for gain or loss on account of prior years' losses would be in accordance with Sections 111 to 115 of the Revenue Act of 1928 and the final interpretation of these provisions by the courts. The Commissioner did not demand that an affiliated group desiring to file a consolidated return for 1929 must subscribe to a specific regulation whereby it

would waive all right to litigate this controversial question with respect to events of years prior to 1929.

If the Commissioner in Article 34 had specifically required adjustments for losses prior to 1929, discrimination would have resulted against affiliated taxpayers accepting his regulations, in the event that it was ultimately determined by the courts that under the general provisions of the Revenue Acts such prior years' losses need not be applied to reduce losses upon the sale. No attempt was made, therefore, to cover the question in Regulations 75. Those regulations settled the question only insofar as operating losses in 1929 and subsequent years were involved and left the question with respect to losses for 1928 and prior years open for determination in accordance with what the courts might decide. Both paragraphs of Article 34 (c) must be considered together if either is to be considered at all.

We have contended before that Article 34 does not apply at all; but, if it is applicable so that the provisions of Article 34 (c) (1) become material, the court below properly held that the petitioner was not entitled to recover, since it had received deductions against its income in previous years for losses of the subsidiaries exceeding in amount the losses now claimed. As the court below stated (R. 118–119), to say that the petitioner sustained a

loss of $306,430.49 on a total investment of $168,812.49 (in both subsidiaries) "is to say what cannot be"—a manifest impossibility.

The statute allows generally the deduction of losses sustained during the taxable year and not compensated for by insurance or otherwise. Section 23 (f) of the Revenue Act of 1928. But the statute never contemplated that the losses should be deducted twice, and unless a double deduction is plainly required it should not be allowed. This Court stated the rule in the *Aluminum Goods* case, 287 U.S. 544, 551, *supra*, where it said that—

> equitable principles of accounting applied to the calculation of the net income of the business unit do not permit deduction of the loss twice * * *.

See also *United States* v. *Ludey*, 274 U.S. 295, 301. Similar double deductions by affiliated corporations have been denied in several cases. *Swift & Co.* v. *United States*, 69 C.Cls. 171; *Levi Strauss Realty Co.* v. *Commissioner*, 41 F. (2d) 55 (C.C.A. 9th); *Kaiwiki Sugar Co.* v. *Bugbee*, 63 F. (2d) 822 (App.D.C.).

The consolidated returns provisions view the business as a unit, in practical effect a single enterprise conducting the business through several different branches. "The purpose of the Congress was to secure substantial equality among stockholders who ultimately bear the burden of taxation and to prevent evasion through the manipulation of intercompany transactions." *Atlantic City Electric Co.*

v. *Commissioner*, 288 U.S. 152, 154. If the petitioner had in fact conducted its business through unincorporated branches, the double deduction here claimed would be impossible.

The fact that the purchase of the stock by the parent represented a capital investment, while the losses of the subsidiaries in years prior to liquidation were operating losses, cannot serve to permit the parent to recover more than its actual investment. The operating losses of prior years were not the petitioner's but were those of the Springer Company and the Roy Company. As they occurred they served to impair the capital value of the subsidiaries equally with the amount of the advances made by the petitioner for use in the subsidiaries' operations. These losses were reflected in the diminishing value of the petitioner's stock investment in the subsidiaries and the obligations represented by the advances. Mere nomenclature, as the court below observed (R. 127), cannot suffice to give a double allowance.[3]

Our contention in this respect is supported by the weight of authority. In addition to the deci-

[3] We cannot assent to the petitioner's statement (Br. 19, 33) that if the three affiliated corporations had filed separate returns for 1929, the parent corporation would have been entitled to deduct the full amount of the loss claimed here. The rule stated in the *Aluminum Goods* case is applicable, we submit, whether the liquidation of the subsidiary occurs during a consolidated or a separate return period. The significant fact is that the parent has once benefited by the subsidiary's losses; it cannot thereafter on any return claim another deduction for what is in reality the same loss.

sion below, the Circuit Court of Appeals for the Fourth Circuit has held in two decisions that a loss suffered upon liquidation must be offset by prior years' losses of the subsidiary, deducted by the parent on consolidated returns. *Burnet* v. *Riggs Nat. Bank*, 57 F. (2d) 980; *Commissioner* v. *Apartment Corp.*, 67 F. (2d) 3. The same result has been reached by the Board of Tax Appeals. *Summerfield Co.* v. *Commissioner*, 29 B.T.A. 77; *National Casket Co.* v. *Commissioner*, 29 B.T.A. 139. While there was no actual deduction of prior years' losses in the *Aluminum Goods* case, the subsidiary's loss for 1917 was offset for excess profits tax purposes against the loss allowed on liquidation, and this Court indicated, as we have shown above, that proper accounting principles "do not permit deduction of the loss twice."*

The only decision directly in conflict is that of *United Publishers' Corporation* v. *Anderson*, 42 F.

* The Commissioner originally took the position that upon the sale of the subsidiary's stock the amount of the gain or loss should be adjusted by the amount of the subsidiary's losses used as an offset against the income of the parent in prior years' consolidated returns. G.C.M. 7765, IX–1 Cumulative Bulletin 223. Following the decision in *United Publishers' Corporation* v. *Anderson*, 42 F. (2d) 781 (S.D. N.Y.), *infra*, the former rule was modified to eliminate from consideration prior years' losses. G.C.M. 8889, IX–2 Cumulative Bulletin 236. After the decision in the *Aluminum Goods* case the ruling contained in G.C.M. 7765 was reinstated and that in G.C.M. 8889 was revoked. G.C.M. 11676, XII–1 Cumulative Bulletin 75. This represents the present administrative policy with respect to the determination of gain or loss upon the sale of a subsidiary's stock.

(2d) 781 (S.D.N.Y.). That court, erroneously we contend, held that the situation was the exact converse of that obtaining in *Remington Rand, Inc.* v. *Commissioner,* 33 F. (2d) 77 (C.C.A. 2d), certiorari denied, 280 U.S. 591. In the latter case it was held that where a parent corporation sold its stockholdings in a subsidiary the excess of the selling price over the cost of the stock was taxable as a gain and that the gain was not to be reduced by undistributed accumulated earnings of the subsidiary taxed in previous years. It cannot be said, however, that the cases of gains on the one hand and of losses on the other must necessarily be treated alike. The one is not the converse of the other. In the case of losses, affiliation brings to the group a benefit it otherwise would not have had—the right to offset the losses of one member against another's gains. But there is no corresponding detriment to the group in the case of gains. Under the Act in question, the group pays no more tax when all have gains than it would have paid if separate returns had been filed.

The taxation of the gain when earned by the subsidiary and again when it is realized by the parent, as the court below recognized (R. 118), is simply the usual case of a tax being paid by a corporation on its earnings and by its stockholder on his gains realized on a disposition of his holdings. Moreover, the decision in the *Remington Rand* case presents no obstacle or hardship to the parent corporation which is not solely within its

control. The seeming double tax may apparently be avoided by the parent causing the subsidiary to declare in dividends the amount of its earnings which represents a gain to the parent on its investment in the subsidiary. Such dividends would not be taxable to the parent, because they are intercompany transactions and also because dividends received by a corporation are not taxable. After the declaration of the requisite dividend the subsidiary's remaining assets may then be transferred to the parent in liquidation of its investment and without any taxable gain. It is apparent, therefore, that the *Remington Rand* decision furnishes no basis for the allowance of a double deduction for the same loss.

In *Burnet* v. *Imperial Elevator Co.*, 66 F. (2d) 643 (C.C.A. 8th), cited by the petitioner (Br. 29), the present question was not squarely considered. The court there stated that operating losses of the subsidiary are different from losses on its stock. But the court's decision did not involve the subsidiary's operating loss. It turned on the fact that the parent's loss on the liquidation of the subsidiary was so large that it offset the parent's operating income for that year, and for the second following year as well, without any resort to the operating loss of the subsidiary. There was, therefore, no double deduction. Losses of prior years were not referred to or considered. In *McLaughlin* v. *Pacific Lumber Co.*, 66 F. (2d) 895 (C.C.A. 9th), the court did not specifically hold that prior

years' losses taken as deductions by the parent should not be offset against a loss on liquidation, but stated that the collector had failed to establish any specific instance of a double deduction.

CONCLUSION

While we contend that the court below was in error in holding that the loss on liquidation must be recognized, it correctly decided that recognizable losses of the parent must be offset by prior years' deductions and therefore it reached the correct result. Its decision should be affirmed.

Respectfully submitted.

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FEBRUARY, 1934.

APPENDIX A

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

* * * * * *

(c) *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. * * *

* * * * * *

(U.S.C.Sup. V, Title 26, Sec. 2115.)

SEC. 141. CONSOLIDATED RETURNS OF CORPORATIONS—1929 AND SUBSEQUENT TAXABLE YEARS.

(a) *Privilege to file consolidated returns.*—An affiliated group of corporations shall, subject to the provisions of this section, have the privilege of making a consolidated return for the taxable year 1929 or any subsequent taxable year, in lieu of separate returns. The making of a consolidated return shall be upon the condition that all the corporations which have been members of the affiliated group at any time during the taxable year for which the return is made consent to all the regulations under subsection (b) prescribed prior to the making of

such return; and the making of a consolidated return shall be considered as such consent. In the case of a corporation which is a member of the affiliated group for a fractional part of the year the consolidated return shall include the income of such corporation for such part of the year as it is a member of the affiliated group.

(b) *Regulations.*—The Commissioner, with the approval of the Secretary, shall prescribe such regulations as he may deem necessary in order that the tax liability of an affiliated group of corporations making a consolidated return and of each corporation in the group, both during and after the period of affiliation, may be determined, computed, assessed, collected, and adjusted in such manner as clearly to reflect the income and to prevent avoidance of tax liability.

(c) *Computation and payment of tax.*—In any case in which a consolidated return is made, the tax shall be determined, computed, assessed, collected, and adjusted in accordance with the regulations under subsection (b) prescribed prior to the date on which such return is made. Only one specific credit, computed as provided in section 26 (b), shall be allowed in computing the tax.

(d) *Definition of "affiliated group".*—As used in this section an "affiliated group" means one or more chains of corporations connected through stock ownership with a common parent corporation if—

(1) At least 95 per centum of the stock of each of the corporations (except the common parent corporation) is owned directly by one or more of the other corporations; and

(2) The common parent corporation owns directly at least 95 per

centum of the stock of at least one of the other corporations.

As used in this subsection the term "stock" does not include nonvoting stock which is limited and preferred as to dividends.

* * * * * *

(U.S.C.Sup. V, Title 26, Sec. 2141.)

Treasury Regulations 75, promulgated under the Revenue Act of 1928 and applicable to 1929 and subsequent years:

ART. 2.—DEFINITIONS.

* * * * *

(e) *Consolidated Return Period.*—The term "consolidated return period" means the taxable year 1929, or any subsequent taxable year, for which a consolidated return is made or is required.

* * * * * *

ART. 11.—CONSOLIDATED RETURNS FOR SUBSEQUENT YEARS.

* * * * * *

(c) *When Affiliated Group Remains in Existence.*—For the purposes of these regulations, an affiliated group shall be considered as remaining in existence if the parent corporation remains as a parent and at least one subsidiary remains affiliated with it, whether or not such subsidiary was a member of the group at the time the group was formed and whether or not one or more corporations have become subsidiaries or have ceased to be subsidiaries at any time after the group was formed.

(d) *When Affiliated Group Terminates.*—For the purposes of these regulations, an affiliated group shall be considered as terminated if the parent corporation ceases to be the parent or if there is no subsidiary affiliated with it.

ART. 13.—CHANGE IN AFFILIATED GROUP DURING TAXABLE YEAR.

(This article has no bearing upon the question as to whether a consolidated return may or must be filed, but relates only to the effect of changes in the affiliated group during the taxable year.)

(a) *General Rule.*—Except as hereinafter provided, a consolidated return must include the income of the parent and of each subsidiary for the entire taxable year.

* * * * *

(c) *Complete Termination of Affiliated Group prior to Close of Taxable Year.*—If an affiliated group is terminated prior to the close of the taxable year of the group, the consolidated return must include the income of the parent for its entire taxable year (excluding any portion of such year during which its income is included in the consolidated return of another affiliated group) and of each subsidiary for the period prior to the termination. (See paragraphs (c) and (d) of article 11, in determining whether the group has terminated.)

* * * * *

(e) *Elimination from Group of a Subsidiary during Year.*—If a subsidiary ceases to be a member of the affiliated group during the taxable year of the group, the consolidated return must include its income for the period during which it was a member of the group.

* * * * *

ART. 31.—CONSOLIDATED NET INCOME.

(a) *Definition.*—Except as otherwise provided in these regulations, the consolidated net income of an affiliated group, which makes or is required to make a consolidated return for any taxable year, shall be the

aggregate of the gross income of each of the members of such group less the aggregate of the allowable deductions of each of such members, except that gain or loss will not be recognized upon transactions between members of the group (referred to in these regulations as "intercompany transactions").

ART. 34. SALE OF STOCK—BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Scope of Article.*—This article prescribes the basis for determining the gain or loss upon any sale or other disposition (hereinafter referred to as "sale") by a corporation which is (or has been) a member of an affiliated group which makes (or has made) a consolidated return for the taxable year 1929 or any subsequent taxable year, of any share of stock issued by another member of such group (whether issued before or during the period that it was a member of the group and whether issued before, during, or after the taxable year 1929), and held by the selling corporation during any part of a consolidated return period. (For the basis in the case of sales of bonds, see article 35.) The paragraphs of this article are applicable to sales during different periods of time, as follows:

(1) Sales which do not break the affiliation—paragraph (b);

(2) Sales which break the affiliation and which are made during the period that the selling corporation is a member of the affiliated group (whether or not during a consolidated return period)—paragraph (c);

(3) Sales made after the selling corporation has ceased to be a member of the affiliated group—paragraph (d).

(b) *Sales which do not Break Affiliation.*—If notwithstanding any such sale the

issuing corporation remains a member of the affiliated group, such basis shall be determined and adjusted in the same manner as if the selling corporation and the issuing corporation had never been members of an affiliated group. (See sections 111 to 115, inclusive, of the Act, and articles 561 to 629, inclusive, of Regulations 74.)

(c) *Sales which break Affiliation made while Selling Corporation is Member of Group.*—If the sale is made during a period during which the selling corporation is a member of the affiliated group (whether or not during a consolidated return period), and if, as a result of such sale, the issuing corporation ceases to be a member of the affiliated group, such basis shall be determined as follows:

(1) The aggregate basis of all shares of stock of the issuing corporation held by each member of the group (exclusive of the issuing corporation) immediately prior to the sale, shall be determined separately for each member of the group, and adjusted in accordance with the Act (see sections 111 to 115, inclusive, of the Act, and articles 561 to 629, inclusive, of Regulations 74);

(2) From the sum of the aggregate bases, as determined in paragraph (1) above, there shall be deducted the aggregate of the losses of such issuing corporation sustained during each of the consolidated return periods (including only the taxable year 1929 and subsequent taxable years) after such corporation became a member of the group and prior to the sale of the stock, to the extent that such losses could not have been availed of by such corporation as a net loss in computing its tax for such periods if it had made a separate return for each of such periods;

(3) The total aggregate basis of all shares of stock, after making the deduction under paragraph (2), shall then be allocated to each member of the group which holds stock in the issuing corporation, in the ratio that the basis of each, as determined under paragraph (1), is to the sum of the bases of all;

(4) The aggregate basis as determined under paragraph (3) for each member of the group shall then be equitably apportioned among the various classes of stock held by such member according to the circumstances of the case—ordinarily in the ratio that the basis of each class of stock held by it at the time of the sale is to the sum of the bases of each class of stock held by it;

(5) The basis of each share of stock of each class held by a member of the group shall then be determined by dividing the basis apportioned to such class under paragraph (4) by the total number of shares of such class held by it.

* * * * *

(d) *Sales after Selling Corporation has ceased to be a Member of the Group.*—If the sale is made after the selling corporation has ceased to be a member of the affiliated group, such basis shall be determined in accordance with paragraph (c) of this article, except that—

(1) The aggregate basis (under subparagraph (1) of such paragraph) shall be determined for all shares of the issuing corporation held by each member of the group immediately prior to the time the selling corporation ceased to be a member of the group (rather than immediately prior to the sale); and

(2) The allocations (under subparagraph (3) of such article) shall be made to each

member of the group which held stock of the issuing corporation immediately prior to the time the selling corporation ceased to be a member of the group (rather than to the members holding such stock at the time of the sale); and

(3) The basis of each share of stock held by the selling corporation (determined, as above, as of the time the selling corporation ceased to be a member of the group) shall then be adjusted in accordance with the Act (see, particularly, sections 111 to 115, inclusive, of the Act and articles 561 to 629, inclusive, of Regulations 74) in order to determine the basis at the time of the sale.

(e) *Limitation on Adjustment For Losses.*—No deduction shall be made under paragraph (c) (2) of this article, in the event of a consolidated net loss which was sustained more than two years prior to the close of the taxable year during which the sale was made and which was not availed of by the members of the affiliated group in computing the tax for the consolidated return period, for that portion of such net loss which the losses of the subsidiary for the year in which such net loss was sustained bears to the aggregate losses of each of the members of the group.

* * * * *

ART. 35.—SALE OF BONDS—BASIS FOR DETERMINING GAIN OR LOSS.

In the case of a sale or other disposition by a corporation, which is (or has been) a member of an affiliated group which makes (or has made) a consolidated return for the taxable year 1929 or any subsequent taxable year, of bonds issued by another member of such group (whether or not issued while it was a member of the group and whether

issued before, during, or after the taxable year 1929), the basis of each bond, for determining the gain or loss upon such sale or other disposition, shall be determined in accordance with the Act (see, particularly, section 113 of the Act), but the amount of any loss otherwise allowable shall be decreased by the excess (if any) of the aggregate of the deductions computed under paragraph (c) (2) of article 34 over the aggregate of the basis of the stock of the issuing corporation as computed under paragraph (c) (1) or (d), as the case may be, held by the members of the affiliated group. (See, also, article 40 (e), relating to disallowance of loss upon intercompany bad debts.)

ART. 37.—DISSOLUTIONS—RECOGNITION OF GAIN OR LOSS.

(a) *During Consolidated Return Period.*—Gain or loss shall not be recognized upon a distribution during a consolidated return period, by a member of an affiliated group to another member of such group, in cancellation or redemption of all or any portion of its stock; and any such distribution shall be considered an intercompany transaction.

(b) *After Consolidated Return Period.*—Any such distribution after a consolidated return period, whether in complete or partial liquidation, shall be treated as a sale of the stock, and the adjustments specified in articles 34 and 35 will be made, and article 36 will be applicable.

ART. 40.—BAD DEBTS.

(a) *Resulting From Transactions During Consolidated Return Period.*—Intercompany accounts receivable or other obligations which are the result of intercompany transactions during a consolidated return

period shall not be deducted as bad debts during a consolidated return period.

* * * * *

(c) *Limitation on Allowance after Consolidated Return Period.*—The rules applicable to the allowance of losses upon the sale of bonds shall be applicable to the allowance after the consolidated return period as a bad debt of an intercompany account receivable or other obligation resulting from an intercompany transaction during the consolidated return period. (See article 35.)

APPENDIX B

Extract from an article by A. W. Mellon, Secretary of the Treasury, printed in the National Income Tax Magazine for March, 1929, Vol. VII, No. 3, p. 106:

> *Dissolution of Subsidiary.*—Neither gain nor loss is recognized upon the dissolution of a subsidiary. Dissolutions may, in theory, be classified into three general types: (a) A "purchasing" dissolution, where, in order to obtain the assets, the stock is purchased and the corporation then dissolved; (b) a "reorganization" dissolution, where a subsidiary is dissolved in order to effect a purely internal rearrangement or reorganization; and (c) a "winding-up" dissolution, where it is decided to abandon the business and close out the affairs of the subsidiary. Obviously, no gain or loss should be recognized, for none is actually realized, in the case of dissolutions of the first two types, while any gain should be taxed and any loss allowed as a deduction in the case of a dissolution of the third type. Generally speaking, however, dissolutions as a practical matter cannot be readily classified. Transactions falling into more than one of the three types are very frequently involved, and the purposes of a dissolution do not always remain constant and are not always apparent or ascertainable. Inasmuch as it would be impossible to prescribe a rule which would distinguish the types and which would

be susceptible of sound administration, and in view of the fact that the benefit of losses which are properly allowable are not denied if the loss is realized before the dissolution or if the subsidiary is not a member of the group at the time of the dissolution, it was concluded that the rule adopted in the Regulations, treating all dissolutions as intercompany transactions, was the safest and best and would prove the most satisfactory. Very substantial benefits both to taxpayers and the Government will result in the certainty as to the rule which is to be applied.

U. S. GOVERNMENT PRINTING OFFICE: 1954

IN THE

Supreme Court of the United States.

OCTOBER TERM 1933.

No. 579.

CHARLES ILFELD COMPANY, *Petitioner,*

v.

B. C. HERNANDEZ, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF NEW MEXICO.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May it please the Court:

The undersigned, Theodore B. Benson, as counsel for The Apartment Corporation, respectfully moves the Court for leave to file the accompanying brief, as amicus curiae, and in support of this motion, shows unto the Court as follows:

The petition of The Apartment Corporation for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is pending before this Court, October 1933 Term, Number 690, and the question there involved, although not precisely the same, is similar to the question presented in the instant case. In Number 690, the respondent has suggested to this Court that decision on the application for certiorari be deferred until argument and decision in the instant case, and petitioner is anxious to have before the Court in the instant case a full discussion of the issues presented.

The purpose of this brief is to present to this Court the view that the Court of Appeals in each of the cases in question erroneously assumed that the taxpayer was claiming the right to a double deduction of the same loss, and refused to follow plain statutory provisions for computing losses.

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Of Counsel.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

AMICUS CURIAE BRIEF ON BEHALF OF THE APARTMENT CORPORATION.

STATEMENT.

In the petition for the writ filed by the Apartment Corporation, No. 690, the facts are stated beginning at page 2, and the applicable provisions of the Revenue Act of 1926 are set forth beginning at page 4 and are not repeated here.

SUMMARY OF ARGUMENT.

The loss incurred when a parent corporation liquidates a subsidiary is an actual loss on the disposal of the stock of the subsidiary and on the taking over of its assets and this loss is not offset or reduced by prior operating losses. The right of the parent to claim the loss is expressly conferred by Sections 202, 203 and 204 of the Revenue Act of 1926 and the corresponding sections 111, 112 and 113 of the Revenue Act of 1928. The basis for determining the amount of the loss is in no manner to be adjusted with reference to operating losses of the subsidiary during prior years.

THE ARGUMENT.

I.

The loss on investment is a real loss, not reduced by operating losses of prior years.

The *Charles Ilfeld Company* case involves the construction of the provisions of Section 142 of the Revenue Act of 1928 which differ from those of the Revenue Act of 1926 and also has to do with Regulations 75 which have no application to the year 1926. The arguments herein are confined to the applicable sections of the Revenue Act of 1926. These sections are those that relate to the method of computing the income of an affiliated group of corporations and those that relate to the determination of a loss on the sale or disposal of property.

The position of the Apartment Corporation is that Congress has in Section 240 of the Revenue Acts of 1921, 1924 and 1926 provided for the filing of affiliated returns and that in Sections 202, 203 and 204 it has provided that on the sale of property the entire amount of the loss shall be recognized, and that these several provisions are separate and distinct. The one has to do with the determination of the income of the affiliated group for each particular year and the other has to do with the loss sustained on the sale of the stock of the subsidiary.

In his brief in the *Charles Ilfeld Company* case the respondent takes the position that no double allowance can be made for the operating losses in the prior years and for the loss on the disposition of the stock of the subsidiary in a later year. The position of the Apartment Corporation is that we are not necessarily concerned with the determination of a double allowance but in the application of the several specific statutory provisions to the several years involved.

The reasoning of the respondent in *Charles Ilfeld Company* case is that as the operating losses of a subsidiary take place they serve to impair the capital value of the subsidiary. This may or may not be true for operating losses are dependent on business conditions during the year of operation and the amount realized by the parent corporation from its investment in the subsidiary is dependent on the remaining assets and the

market conditions during the year of the sale or disposal of the stock of the subsidiary. The mere fact that the subsidiary operated at a loss in some prior year may have no bearing whatever on the amount of loss sustained by the parent corporation in the future year when the stock of the subsidiary is disposed of. In considering the soundness of the reasoning of the respondent the thought must not be lost sight of that no loss can be claimed by the parent corporation on account of its investment in the subsidiary until it disposes of the latter's stock by sale or exchange. *U. S. v. White Dental Mfg. Company*, 274 U. S. 398.

It is submitted that Section 240 and its objects have no bearing upon the subject covered by Sections 202, 203 and 204 of the Revenue Act of 1926. By Section 240, Congress provided a method of determining the annual operating income of an affiliated group of corporations, and by the provisions of Sections 202, 203 and 204 it provided that the entire amount of the loss realized by a parent corporation on the disposal of the stock of the subsidiary should be deducted in the year of sale or disposal.

If this position is not upheld it will mean that at least two of the clearly expressed intents of Congress will be defeated. These are that income shall be determined on an annual basis and that taxable income of affiliated corporations filing a consolidated return shall be the income of the group.

For the year 1921 the Apartment Corporation, the University Homes Company and the Consolidated Apartment House Company were required to file a consolidated return and to report therein the loss sustained by the University Homes Company in the amount of $50,764.31. The provisions of the Revenue Act of 1921 with reference thereto are absolute and the Apartment Corporation was required to join in such return and to claim such losses whether or not to its benefit or to the benefit of the third corporation. In subsequent years the filing of a consolidated return was optional. The option was not exercised for the years 1922 and 1923, if the decision of the Board of Tax Appeals in *Apartment Corporation* v. *Commissioner*, 17 B. T. A. 876, is correct.

In his brief in the *Charles Ilfeld Company* case the respondent states that the parent Corporation can not recover more than its actual investment. The Circuit Court of Appeals for the Fourth Circuit followed this line of reasoning and based its conclusion on the assumption that the Apartment Corporation sustained no deductible loss in 1926 because the losses allowed the affiliated group in previous years were in excess of the loss sustained by reason of the advances. The holding of that court is that the losses were allowed to the Apartment Corporation. This it is submitted is erroneous for the reason that the Apartment Corporation during the prior years was merely a member of an affiliated group and the operating losses were not allowed as deductions to the Apartment Corporation but were merely taken into account in determining the income of the group and there is no reason to suppose that the Consolidated Apartment House Corporation was not benefited equally with the Apartment Corporation. As a matter of fact the Circuit Court of Appeals for the Fourth Circuit ignored entirely the fact that consolidated returns for prior years were filed under the provisions of Section 240 of the several revenue acts and apparently finds that the Apartment Corporation has claimed deductions annually because of its advances to the University Homes Company. The reasoning adopted by that court is not based on the provisions of the several revenue acts and because of that is erroneous.

The respondent in his brief in the *Charles Ilfeld Company* case, following in the steps of the Circuit Court of Appeals for the Fourth Circuit, states that the subsidiary corporation is to be considered as a branch of the parent. This conclusion is directly in conflict with the provisions of Section 240 with reference to affiliated returns. In an affiliated return a subsidiary corporation is not treated as a branch but as a corporation of equal dignity with the parent corporation. The relationship is looked to merely to determine the fact of affiliation and not to determine the income of the group. Once in the group the distinction between the corporation as parent and subsidiary ceases.

The contention of the respondent that the *Charles Ilfeld*

Company is seeking to claim a double deduction is a mere conclusion based on an assumption that the allowance of the operating loss to the affiliated group and the allowance to the parent corporation of the loss sustained on the disposal of the stock of the subsidiary amounts to a double deduction to the parent corporation. Just what this benefit would be would, of course, require proof of the actual benefit to the parent corporation during prior years which would involve two things that Congress has clearly sought to avoid. The first is, as above stated, the determination of income on an annual basis and the second is the avoidance of complicated and difficult adjustments in tax determination.

Just what the benefit to the parent corporation would be would involve considerable proof of what had transpired in prior years and would bring into consideration the several rates of taxation which Congress has seen fit to change for the several years. This is clearly demonstrated by the record in the *Ilfeld* case. We take as an example the case of the Ilfeld Company and its subsidiary the Springer Trading Company. The operating losses of the Springer Company for some of these years, being combined with income earned by the other members of the group for the purpose of tax computation, naturally reduced the tax liability of the group. The amount of such reduction in tax liability does not appear in the record, but the amount of the Springer Company's losses does appear. As the tax on corporate income since 1921 has been at a flat rate, it is easy to compute the actual reduction of tax liability for the years 1922 to 1928, inclusive, growing out of the situation. An examination of the footnote[1] will show that

Year	Springer Co. loss	Tax Rate	Tax Reduction
1922	$30,701.29	12½	$3,837.66
1923	3,794.38	12½	474.29
1924	4,719.71	12½	589.96
1925	11,100.64	13	1,443.08
1926	3,552.31	13½	479.56
1927	4,491.22	13½	606.31
1928	2,572.83	12	308.74
Totals	$60,932.38		$7,739.60

the advantage derived by the group from the filing of a consolidated return with the Springer Company for those years, in dollars and cents, amounted to $7,739.60, and not $60,932.38 as decided by the court below. This is without consideration of the fact that the benefit in question was more than offset by the amount of the operating losses. In other words, the affiliated group, and ultimately the parent corporation, is actually poorer as a result of the operating losses there set out, even after getting the benefit of the tax reduction under a consolidated return, by $53,192.78. Yet the respondent treats the case as though the parent had actually received a return of its investment of $60,932.38, simply because the subsidiary had operating losses of that amount! With this graphic statement of the elements involved, it becomes obvious that the respondent, under the guise of an argument that petitioner is claiming a double deduction of the same loss, is refusing in fact to offset investment in the stock of the subsidiary against the proceeds on liquidation of the investment. His argument resolves itself into the proposition that a taxpayer which has been penalized by unprofitable operation shall be further penalized by being denied the right to deduct the full and actual loss on investment.

II.

The right to deduct the loss on investment, without regard to operating losses of prior years, is expressly conferred by statute.

The mere fact that a taxpayer may receive a benefit or even a double benefit from an express provision of the revenue act should not defeat his right to claim what Congress has expressly conferred on him, which in the case of the Apartment Corporation is the entire amount of the loss sustained and which is defined as the excess of the cost over the amount realized without any mention of, or provision for, adjustment for operating losses in prior years.

Section 203 (a) *requires* that the "entire amount" of the loss (which section 234 permits as a deduction) "determined

under section 202" be recognized. Section 202 provides that the loss shall be the excess of the basis provided in 204 over the amount realized on disposition of the stock. Section 204 says that such basis shall be "the cost" of the stock, but provides for adjustment of that basis under various circumstances not applicable to our situation. It is to be assumed that Congress did not have in mind, but left to implication, any other provision for a reduction of the basis. *Expressio unius est exclusio alterius.* Furthermore if these statutory provisions needed clarification, in determining their application to a situation like ours, Section 201 (c) should set at rest all shadow of doubt. That section provides that "amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock * * *. The gain or loss to the distributee * * * shall be determined under Section 204 * * *."

A taxpayer should not be permitted to circumvent or defeat the provision of the revenue act, but certainly there is nothing unjust or inequitable in his accepting a benefit expressly conferred by a provision of the act.

There are many inequitable provisions in the several revenue acts and there is much double taxation. A clear illustration of this is the imposition of the capital stock tax on a parent corporation by the inclusion of the value of the assets of a subsidiary which is also required to pay the tax on the same assets. In the present case the Apartment Corporation was required to pay the capital stock tax on the value of the stock of the University Homes Company which in turn was required to pay the same tax on the value of the same assets. This is double taxation and the corporations could not escape the inequitable provisions of the law for the simple reason that Congress had by express provision levied the same tax on the value of the same assets to each corporation.

It is submitted that the same line of reasoning which upholds the principle of double taxation should apply to deductions and that it is within the power of Congress by express legislation to allow the same or similar deductions in different years.

In the case of *Remington Rand* v. *Commissioner*, 33 Fed.

(2d) 77, certiorari denied 280 U. S. 591, the situation was the exact converse and it was held that on the sale by the corporation of the stock of the subsidiary the excess of the selling price over the cost of the stock is taxable as a gain and that this taxable gain is not to be reduced by the amount of undistributed accumulated earnings of the subsidiary which had been taxed in previous years in affiliated returns. This is a clear illustration of double taxation which Congress has expressly provided shall be levied and it is submitted that the same principle should be applied in determining the amount of a loss that was there applied in determining the amount of a gain. The provisions of the revenue act with reference to the determination of gain and loss are contained in the same sections and are identical. To do as the respondent suggests is to apply different rules of construction to the same statute to meet different situations. To define gain in the one sense and loss in the other would, of course, defeat the clearly stated intent of Congress which is that the entire amount of either the gain or the loss shall be recognized regardless of what might have transpired in some prior years.

The respondent's argument presupposes that the subsidiary's loss was applied solely in reduction of the parent's income, whereas it actually reduces ratably the income of other subsidiaries having income. If the Government's theory be adopted, however, the parent will be charged with all such operating losses as a theoretical return of capital. Furthermore, it will be charged with such losses even where the subsidiary's income in other years equals or exceeds its losses, because, under the decision in *Remington Rand* v. *Commissioner*, *supra*, it may not claim the benefit of the income on which tax was paid.

With the decisions of the Tenth Circuit in the *Charles Ilfeld Company* case and that of the Second Circuit in the *Remington Rand* case before us let us assume that the other subsidiary of the Apartment Corporation, The Consolidated Apartment House Company, did during the prior years operate at a profit and that during the year 1926 the Apartment Corporation sold the stock of this subsidiary as well as that of the University

Homes Company. The question would then arise, how is the loss in the one instance and the gain in the other to be determined? If it is done as the respondent contends, the loss sustained on the disposition of the stock of the University Homes Company would be offset by prior year losses while on the other hand the gain derived on the sale of the stock of the Consolidated Apartment House Corporation would be included in its entirety. The result of such computation would certainly do more to distort income than does the decision of the Board of Tax Appeals in the case of the *Apartment Corporation*, 26 B. T. A. 849.

The question that is presented to the Court in these cases is not whether an isolated taxpayer may or may not obtain what appears to be a double benefit, but the question is, what is the proper method to be employed to determine the amount of the gain or the loss on the disposition of the stock of the subsidiary? To say that the same statutory provisions should be construed to establish a different rule for the determination of gain than that to be employed for the determination of loss appears to be altogether inconsistent and not supported by any provisions of the revenue acts. Congress defines net income as gross income less deductions and it was certainly not intended that a tentative computation should be made to determine whether there had occurred a gain or a loss before it should be decided which rule should be elected as applicable.

CONCLUSION.

The decision below ignores explicit statutory provisions and is founded on the fallacy that petitioner seeks to deduct a loss allowed as a deduction in prior years.

Respectfully,

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Supreme Court of the United States

October Term, 1933.

No. 579.

CHARLES ILFELD COMPANY,
Petitioner,

vs.

B. C. HERNANDEZ, Collector of Internal Revenue for the District of New Mexico,
Respondent.

MOTION OF ROBERT H. MONTGOMERY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF *AMICUS CURIAE.*

ROBERT H. MONTGOMERY,
Counsel for The American Tobacco Company as Amicus Curiae.

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Supreme Court of the United States

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CHARLES ILFELD COMPANY,
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vs.

B. C. HERNANDEZ, Collector of Internal Revenue for the District of New Mexico,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE.*

MAY IT PLEASE THE COURT:

The undersigned, as counsel for The American Tobacco Company, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae.*

ROBERT H. MONTGOMERY,
Counsel for The American Tobacco Company as Amicus Curiae.

IN THE

Supreme Court of the United States

October Term, 1933

No. 579

CHARLES ILFELD COMPANY,
Petitioner,

vs.

B. C. HERNANDEZ, Collector of Internal Revenue for the District of New Mexico,
Respondent.

BRIEF AS AMICUS CURIAE.

Permission of the Petitioner and of the Respondent first having been obtained, the undersigned attorney respectfully submits the following brief as Amicus Curiae in the above entitled cause.

Preliminary Statement.

This brief will be addressed to the question of law involved in the *second* of the *Specifications of Assigned Errors* set forth in Petitioner's brief at page 9, to wit, whether a parent corporation must reduce the loss sustained upon the liquidation of a subsidiary by the amount of the operating loss of the subsidiary previously reflected in a consolidated return filed for the affiliated group.

The undersigned attorney represents The American Tobacco Company in a case involving a similar question which is now pending before the United States District Court for the Southern District of New York.

ARGUMENT.

I.

A parent corporation is required, upon the sale or liquidation of a subsidiary, to include in its taxable income, the profits arising from such sale or liquidation, even though the said profits have been reflected in a consolidated return.

The foregoing proposition is supported by the decision of the Circuit Court of Appeals for the Second Circuit in *Remington-Rand, Inc.* v. *Commissioner*, 33 F. (2d) 77. The decision apparently has the approval of this Court, because a petition for a writ of certiorari was denied (280 U. S. 591).

In the *Remington-Rand* case it appeared that the operating profits of the subsidiary, though reported as income in the consolidated return, had not been distributed as dividends to the parent (the taxpayer). Apparently, on the theory that these undistributed profits contributed to the enhancement in value of the subsidiary's stock, the taxpayer asserted that unless the amount of the taxable gain was reduced by the amount of the operating profits previously taxed in the consolidated return these operating profits would be taxed twice. The taxpayer's contention failed and the Government's position was sustained. The decision was sound and the principles enunciated by the Court accord in every particular with the principles which the Petitioner asserts are controlling in the instant case.

II.

The statute makes no distinction in its treatment of gains as distinguished from losses.

In all of the income tax laws, gains and losses are governed by the same principles. If an asset is sold or otherwise converted, the difference between its cost and the sales price is profit or loss as the case may be.

The effect of the decision below, taken in connection with the *Remington-Rand* case, is that the entire gain from the liquidation of a subsidiary is to be taxed, while only a part or none of the loss from a liquidation is to be allowed as a deduction.

On facts identical with those presented in the case at bar, in the case of *United Publishers' Corporation* v. *Anderson*, 42 F. (2d) 781, the Government (as it is doing in this case) took a position which was fundamentally inconsistent with that which it had taken in the *Remington-Rand* case. The Government asserted that if the taxpayer's loss upon the sale of the stock of its subsidiary was not reduced in the amount of the subsidiary's operating losses previously deducted in a consolidated return, the *taxpayer* would be given a double deduction. The Government's contention here was just as unsound (and the Court so held) as the taxpayer's contention was in the *Remington-Rand* case, where the taxpayer asserted that unless its profit upon the sale of the stock of its subsidiary was reduced in the

amount of the subsidiary's operating profits previously taxed in a consolidated return the *taxpayer* would be subjected to double taxation.

The Court held in the *United Publishers'* case that the situation presented was the exact converse of that in the *Remington-Rand* case and accordingly held that the loss of the taxpayer should not be reduced in the amount of the operating losses of the subsidiary previously deducted in a consolidated return.

The only theory upon which the loss claimed in the instant case can be disallowed is that the operating losses of the subsidiaries reduced the assets of the subsidiaries (which were in substance the capital assets of the parent) and that a double deduction for the loss of these *capital* assets would therefore result unless the loss realized upon liquidation of the subsidiaries were adjusted for operating losses previously deducted in the consolidated return. Opposed to this theory is the *Remington-Rand* case. The operating profits of the subsidiary which were included from year to year in the consolidated return as income increased the assets of the subsidiary (which on the above theory were in substance the *capital* assets of the parent) *but* the Court in the *Remington-Rand* case *refused* to hold that this was any justification for adjusting the gain realized upon the sale of the stock of the subsidiary by the amount of these operating profits.

CONCLUSION.

It is therefore submitted that the decision below should be reversed.

Respectfully submitted,

ROBERT H. MONTGOMERY,
Counsel for The American Tobacco Company.

Of Counsel:
THOMAS G. HAIGHT,
J. MARVIN HAYNES.

SUPREME COURT OF THE UNITED STATES.

No. 579.—October Term, 1933.

Charles Ilfeld Company, Petitioner,
vs.
B. C. Hernandez, Collector of Internal Revenue for the District of New Mexico.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[April 2, 1934.]

Mr. Justice Butler delivered the opinion of the Court.

In 1917 petitioner purchased all the capital stock of the Springer Trading Company for $40,000 and in 1920 all that of the Roy Trading Company for $50,000. It held these shares until late in 1929 when both companies were dissolved. In that period it advanced the Springer Company sums amounting to $69,030.27, and the Roy Company $9,782.22. Nothing having been paid it on account of these advances, petitioner had an investment in the former of $109,030.27 and in the latter of $59,782.22. It made consolidated returns which took into account the gains and losses of each subsidiary. Operations of the Springer Company resulted in losses in all but two of the years and those of the Roy Company in all but four. The losses of the former exceeded its gains by $118,510.53, and those of the latter by $57,127.85. In 1929, before the end of November, the subsidiaries sold all their property to outside interests. After paying debts to others, each had a balance—the Springer Company, $22,914.22, and the Roy Company, $15,106.16—which it paid petitioner on December 23. Both subsidiaries were dissolved December 30 in that year.

Petitioner made a consolidated return for 1929 based on the results of operation and the liquidation of each subsidiary but made no deduction of losses resulting to itself from the liquidations. The return showed a tax of $20,836.20 which was duly paid. In May, 1931, petitioner filed an amended return and claimed a refund of $14,406.43. This return does not take into account profits or losses of subsidiaries in that year but deducts the losses

above shown to have resulted to petitioner from its investments in them.* The commissioner rejected the claim. Petitioner brought this action in the Federal district court for New Mexico against the collector to recover the amount of its claim. A jury was waived, the court made special findings of fact, stated its conclusions of law and gave petitioner judgment as prayed. The Circuit Court of Appeals reversed. 66 F. (2d) 236. 67 F. (2d) 236.

The question is whether petitioner is entitled to deduct from its 1929 income any part of the losses resulting from its investments in the subsidiaries.

The Revenue Act of 1928 and Regulations 75 made under § 141 (b) govern. Section 141 (a) gives to groups of affiliated corporations the privilege of making consolidated returns, in lieu of separate ones, for 1929 or in subsequent years upon condition that all members consent to the regulations prescribed prior to the return. And, in view of the many difficult problems arising in the administration of earlier provisions authorizing consolidated returns, the Congress deemed it desirable to delegate by § 141 (b) the power "to prescribe regulations legislative in character". Senate Report No. 960, 70th Cong., 1st Sess., p. 15. That subsection authorizes the commissioner, with the approval of the Secretary, to make such regulations as he may deem necessary in order that the tax liability of an affiliated group and of each member "may be determined, computed, assessed, collected, and adjusted in such manner as clearly to reflect the income and to prevent avoidance of tax liability".

The making of the consolidated return constituted acceptance by petitioner and its subsidiaries of the regulations that had been prescribed. No question as to validity is raised. The brief substance of the regulations here involved follows:

Article 37 (a) provides: Gains or losses shall not be recognized upon a distribution *during* a consolidated return period by one member to another in cancelation or redemption of its stock; "and

	Springer Co.	*Roy Co.*	*Combined*
*Operating losses claimed and deducted prior to 1929	$131,424.41	$59,007.25	$190,431.66
Investment loss claimed for 1929	86,116.05	44,676.06	130,792.11
Total losses claimed	217,540.46	103,683.31	321,223.77
Investment (stock plus advances)	109,030.27	59,782.22	168,812.49

any such distribution shall be considered an intercompany transaction". And subdivision (b) requires that any such distribution *after* a consolidated return period shall be treated as a sale, and directs adjustments to be made in accordance with articles 34, 35 and 36.

Article 34 (a) prescribes the basis for determination of gain or loss upon a sale by a member of stock issued by another member and "during any part of the consolidated return period" held by the seller. Subdivision (c) applies to sales which break affiliation and which are made during the period that the selling corporation is a member of the affiliated group.

Article 40 (a) directs that intercompany accounts receivable or other obligations which are the result of intercompany transactions during a consolidated return period shall not "during a consolidated return period" be deducted as bad debts. Subdivision (e) governs deductions after the consolidated return period on account of such transactions during the period.

1. In the absence of a provision in the Act or regulations that fairly may be read to authorize it, the deduction claimed is not allowable. *Brown* v. *Helvering*, — U. S. —, —, —. *Burnet* v. *Houston*, 283 U. S. 223, 227. Cf. *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 326. Petitioner contends that Articles 37 (b) and 34 (c) cover the case. We are unable so to construe them. Article 37 relates to dissolutions. Subdivision (b) deals with distributions made after a consolidated return period. The record conclusively shows that each subsidiary handed over the balance before the dissolution was consummated and during the consolidated return period. Article 34 relates exclusively to the sale of stock. No sale of stock was involved. The parent and subsidiary corporations were the only parties. Neither subsidiary acquired stock of the other or that issued by itself. The petitioner retained all the shares of each and at the end voted dissolutions that operated to cancel them.

2. Respondent, relying on Articles 37 (a) and 40 (a), maintains that the losses petitioner seeks to deduct arose from intercompany transactions during the consolidated return period and therefore may not be allowed.

Article 37 (a) forbids the recognition of losses upon distribution during the consolidated return period and declares that such distributions shall be considered intercompany transactions. Article

40 (a) forbids during that period the deduction as bad debts of obligations which are the result of intercompany transactions. The payment of the liquidating dividends was made during the return period and was the last step leading up to the action of directors and stockholders for the dissolution of the subsidiaries. The amount handed over by the Springer Company was less than petitioner's advances to it, but the amount paid by the Roy Company was greater than the advances to it. Undoubtedly the obligation of the subsidiaries in respect of the advances would be held to be intercompany accounts receivable quite independently of the regulations.

But a word is necessary as to the subsidiaries' obligations to the petitioner as stockholder. The record does not disclose whether the latter obtained the stock directly from the issuing corporations or purchased from others. Without regard to the manner of acquisition, the amount paid constituted investment in the subsidiaries. And, as it was the owner of all the shares of the subsidiaries, petitioner will be deemed to have directed all their activities in the unitary business and as well the steps taken for their liquidation and dissolution. They were liable to it alone for the balances remaining after payment of the amounts owed others, and it was equally entitled whether claiming as lender or shareholder. Under the circumstances, it reasonably may be held that their obligation in respect of petitioner's stock ownership resulted from intercompany transactions within the meaning of Article 40 (a). Petitioner rightly says, as does respondent, that the amounts paid for the stock and the advances later made to the subsidiaries stand on the same footing. But its contention that the transactions out of which the claimed losses arose did not occur during the consolidated return period cannot be sustained. Petitioner is therefore not entitled to deduct them from its 1929 income.

3. The allowance claimed would permit petitioner twice to use the subsidiaries' losses for the reduction of its taxable income. By means of the consolidated returns in earlier years it was enabled to deduct them. And now it claims for 1929 deductions for diminution of assets resulting from the same losses. If allowed, this would be the practical equivalent of double deduction. In the absence of a provision of the Act definitely requiring it, a purpose so opposed to precedent and equality of treatment of taxpayers

will not be attributed to lawmakers. Cf. *Burnet* v. *Aluminum Goods Co.*, 287 U. S. 544, 551. *United States* v. *Ludey*, 274 U. S. 295, 301. There is nothing in the Act that purports to authorize double deduction of losses or in the regulations to suggest that the commissioner construed any of its provisions to empower him to prescribe a regulation that would permit consolidated returns to be made on the basis now claimed by petitioner.

In *Remington Rand, Inc.* v. *Commissioner*, 33 F. (2d) 77, the Circuit Court of Appeals for the Second Circuit held a subsidiary company's accumulated earnings on stock sold to a parent company could not be added to the cost of the stock in determining taxable gain arising on the latter's sale to outsiders. In *United Publishers' Corporation* v. *Anderson*, 42 F. (2d) 781, a district court in the same circuit, deeming the *Remington Rand* case applicable, held that a parent corporation filing consolidated returns showing losses of a subsidiary during earlier years could nevertheless deduct loss on the sale of the subsidiary's stock. Petitioner insists that same principle governs both decisions and that therefore the deduction should be allowed. But the analogy is not good. Where all the members gain, total taxable income is the same on a consolidated return as upon separate ones. But where as in the case before us the subsidiaries lose and the parent gains, the losses of the former go in reduction of the taxable income of the latter. Considerations that justify inclusion of the profits made by all the members do not support the double deduction claimed.

The weight of authority is against petitioner's contention. *Barnet* v. *Riggs Nat. Bank*, 57 F. (2d) 980. *Commissioner* v. *Apartment Corp.*, 67 F. (2d) 3. *Summerfield Co.* v. *Commissioner*, 29 B. T. A. 77. *National Casket Co.* v. *Commissioner*, 29 B. T. A. 139. No decision other than that of the district court in *United Publishers' Corporation* v. *Anderson*, *supra*, gives any support to its claim. Cf. *Burnet* v. *Imperial Elevator Co.*, 66 F. (2d) 643. *McLaughlin* v. *Pacific Lumber Co.*, 66 F. (2d) 895.

Affirmed.

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Test:

Clerk, Supreme Court, U. S.